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No.

IN THE

Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 2 of the Sherman Act impose on a vertically integrated producer a duty to price its raw material and finished products so as to avoid a "price squeeze" on a non-integrated finished product fabricator, even though the integrated producer has no monopoly over the raw material, but rather is only one of several substantial suppliers?

2. Can Section 2 liability for a "price squeeze" be based on "price leadership" in the raw material market where, during the period of the alleged squeeze: (a) the non-integrated fabricator purchased all of its raw material from a competitor of the integrated firm; and (b) the only record evidence of actual prices showed that the competitor did not follow the integrated firm's prices?

RULE 28.1 STATEMENT

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. Neither of the Petitioners has any subsidiaries or affiliates which have any publicly held securities, except Hindustan Aluminium Corporation, Ltd.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This petition for a writ of certiorari, filed on behalf of Kaiser Aluminum & Chemical Corporation and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), presents vitally important antitrust issues that divided the Court of Appeals for the Third Circuit. As Circuit Judge Adams stated in dissenting from the denial of Kaiser's petition for rehearing, the decision below represents a "significant extension" of the "price squeeze" theory of antitrust liability for monopolization under Section 2 of the Sherman Act.

OPINIONS BELOW.

The Opinion and Judgment of the Court of Appeals dated December 27, 1984, reported at 752 F.2d 802, is reproduced in Appendices "B" and "C" to this Petition. The Opinions of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), reported

at 518 F. Supp. 102 and 559 F. Supp. 922, are reproduced in Appendices "D" and "E", respectively. The Opinion of the Court of Appeals in a prior appeal decided on May 24, 1978, and reported at 579 F.2d 20, is reproduced in Appendix "F".

JURISDICTION

The judgment of the Court of Appeals (A-31-32), affirming a treble-damage award of $9,567,939 was entered on December 27, 1984. Kaiser's timely petition for rehearing and suggestion of rehearing in banc was denied by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254-(1).

STATUTE INVOLVED.

The only remaining claim in this case arises under Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

STATEMENT OF THE CASE.

The Court of Appeals' affirmance of the jury verdicts in this case rests on a ruling that Kaiser, an integrated producer of aluminum culvert pipe, could have been found to have imposed an unlawful "price squeeze" on an independent pipe producer, even though (a) Kaiser competed with other major suppliers and thus did not have unilateral monopoly power over the price of aluminum coil, the raw material from which culvert pipe is

made, (b) the independent culvert pipe producer purchased all of its raw material from a Kaiser competitor, and (c) the only record evidence of actual prices showed that the competitor from whom the independent purchased its raw material did not follow Kaiser's prices.

This private antitrust action involves competition in the mid-Atlantic States in culvert and drainage pipe ("culvert pipe"), a product used to convey water underground from one point to another. Culvert pipe is made of a variety of materials, including concrete, steel, aluminum, plastic, asbestos cement, and vitrified clay, and is sold to federal, state, and local highway departments, counties, municipalities, and private contractors engaged in real estate development, which use the pipe in the construction of roadside drainage and storm sewers.

Culvert pipe was and still is manufactured primarily from concrete and steel. In the late 1950's, aluminum was introduced by Kaiser as a culvert material. Thereafter, Kaiser mounted efforts to secure acceptance of aluminum by engineers and writers of highway construction specifications as an alternate culvert material to concrete and steel.

1. *The Parties.*

A. Columbia.

Respondents, the plaintiffs in this private antitrust suit, are the former shareholders of Columbia Metal Culvert Co., Inc. ("Columbia").[1] Columbia, a New Jersey fabricator of aluminum culvert pipe, began operations in 1960. Until 1971, Columbia purchased the aluminum coil it used to make culvert pipe primarily from Kaiser. In 1971, a dispute developed between Columbia and Kaiser concerning their supplier-customer relationship, and

1. This case was instituted in 1974 in the name of Columbia, but later continued in the name of respondents, Columbia's stockholders, after Columbia sold its business to Howmet Aluminum Company.

Columbia thereafter began to purchase its requirements from Reynolds Metals Company ("Reynolds"). By late 1973 Columbia had begun to purchase aluminum coil exclusively from Aluminum Company of America ("Alcoa"). During the entire period of 1971-1977, Columbia purchased its coil requirements from Reynolds and Alcoa—not from Kaiser.

In October, 1973, Columbia borrowed additional capital to make modifications to its pipe production facilities. At the same time a recession in the construction industry which continued in 1974 led to a general decline in demand for culvert pipe and made it difficult for Columbia to service its debt. Federal price controls in effect during the Nixon Administration kept aluminum coil prices at the same level from 1969 through 1973. Although demand for culvert pipe was low, the general demand for aluminum for other uses remained high. When price controls on aluminum coil were removed in early 1974, the price of aluminum coil rose sharply. Burdened with debt and suffering from cash-flow problems, Columbia began to decline to bid on most long-term supply contracts and its sales declined, aggravating its precarious financial condition. It suspended its manufacturing operations in 1975. Revived by an Economic Development Administration loan on June 1, 1977, it resumed manufacture of pipe for several months. Columbia sold its assets to Howmet Aluminum Company in 1978.

B. *Kaiser.*

The third largest domestic aluminum manufacturer, Kaiser accounts for only approximately 15 percent of domestic aluminum production capacity in an industry that was once monopolized by Alcoa, Kaiser's competitor. *See, United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.). Like Alcoa, Reynolds and other domestic aluminum producers, Kai-

ser is vertically integrated and engages in most stages of aluminum production from mining of bauxite and refining to manufacture of aluminum semi-finished and finished products. Among the semi-finished products Kaiser produces is aluminum coil. Coil, in turn, is used not only in making culvert pipe, but is principally used for various finished aluminum products, including aluminum cans, residential siding, tubing and automotive and aircraft parts.

As noted above, Kaiser pioneered aluminum as a culvert material. It fabricates aluminum culvert pipe at a number of facilities throughout the United States and sells the product through independent distributors and its own sales force in competition with concrete, steel and aluminum pipe fabricators. Kaiser's larger competitors, Alcoa and Reynolds, have participated in the culvert pipe market only by selling aluminum coil to independent pipe fabricators. During the period from 1962 through 1974, Kaiser located a number of aluminum pipe machines in various parts of the United States, and by 1974 had facilities in nine locations, including New Castle, Delaware.[2]

The New Castle facility, located approximately fifty miles from Columbia's plant in Vineland, New Jersey, began operations in May of 1973, after Kaiser lost Columbia as a major customer. At about the same time, Kaiser appointed Kennedy Culvert & Supply Co., as a distributor of culvert pipe. Kennedy Culvert & Supply was owned by Robert A. Kennedy, who had been a salesman in Columbia's employ.

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2. New Castle is located within the Mid-Atlantic area, which was stipulated by the parties to constitute the relevant geographic market for culvert pipe. This area is bordered by Connecticut in the North, West Virginia to the West and Virginia to the South.

2. *The Proceedings Below.*

A. Columbia's Complaint.

Columbia's complaint, as supplemented in 1976, charged Kaiser, Mr. Kennedy and his company with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§1 and 2, Section 3 of the Clayton Act, 15 U.S.C. §14, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a).[3] Columbia charged that Kaiser violated Sections 1 and 2 of the Sherman Act by engaging in a conspiracy with its wholly-owned subsidiary and with Kennedy to eliminate Columbia as a competitor, allegedly because Columbia refused to purchase all its aluminum supply from Kaiser.

Columbia relied on five acts that were said to prove the alleged antitrust violations, including its principal claim that beginning in January, 1974, Columbia was a victim of a "price squeeze," whereby the margin between aluminum coil prices and its finished culvert pipe prices was not sufficient to permit profitable sales.[4]

The only claim of violation that now remains is Columbia's assertion of liability under Section 2 of the Sherman Act for attempts to monopolize and monopolization.[5]

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3. Columbia's initial complaint was filed on January 14, 1974.

4. Columbia contended that the violation also consisted of allegations that in 1968, Kaiser persuaded Columbia to install a certain kind of pipe-making machine, called a Stamco spiral machine, which by 1973 required modification; that in 1971 Kaiser refused to deal with Columbia because Columbia had decided to switch its source of supply, in part, to Reynolds; that in May 1973, Kaiser located a pipe-making facility in New Castle, Delaware, within the stipulated relevant geographic market and close to Columbia's plant in Vineland, New Jersey; and that in May 1973, Kaiser appointed Kennedy, who had resigned as a Columbia salesman, as an independent distributor for its pipe.

5. All other claims have either been abandoned (price discrimination under the Robinson Patman Act), set aside (conspiracy under Sections 1 and 2 of the Sherman Act), or dismissed (exclusive dealing under Section 3 of the Clayton Act).

B. *The 1977 Trial.*

Trial of Columbia's claims began in April 1977. At the conclusion of Columbia's case, the district court granted defendants' motion for a directed verdict in their favor on all counts of the Complaint and entered judgment accordingly. The directed verdict was based largely on the trial court's finding that the evidence conclusively demonstrated that the relevant finished product market consisted of culvert pipe made from both steel and aluminum.

C. *The First Appeal.*

The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence to permit a jury reasonably to infer that the relevant product market consisted only of pipe made from aluminum. With the finished product market so narrowly drawn,[6] it was possible, according to the Court, to conclude that Kaiser possessed as much as 80% of that market and that Kaiser had "unlawfully exercised" its monopoly power to Columbia's detriment. 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).[7]

D. *The Second Trial.*

The case was tried on remand in 1979. The centerpiece of Columbia's claim was that Kaiser deliberately

6. Kaiser does not urge the Third Circuit's erroneous market definition determination as a basis for review in this Court, except insofar as the artificially narrow market definition helps explain the occurrence of the alleged "price squeeze."

7. The Court of Appeals in this earlier appeal upheld the directed verdict as to Columbia's claim that Kaiser violated Section 3 of the Clayton Act. 15 U.S.C. §14. The Court concluded that Columbia had failed to adduce any evidence whatsoever of the relevant product market in which sheet and coil is sold. 579 F.2d at 36. In the absence of such evidence, a jury could not determine whether Kaiser's alleged "exclusive dealing" foreclosed Kaiser's competitors from a substantial part of the "market".

imposed an unlawful "price squeeze" on Columbia. According to Columbia, Kaiser imposed this "price squeeze" even though Kaiser was not selling Columbia aluminum coil, the raw material, and even though Kaiser's finished pipe prices were always above its own costs.

Because Kaiser was not Columbia's supplier of aluminum coil during the time period of this alleged "price squeeze," Columbia was obliged to contend that Kaiser somehow "controlled" the prices of the other aluminum producers, including Alcoa, which did supply Columbia with coil during the "squeeze". Columbia argued that by exercising "price leadership," Kaiser could control the margin between prices at two distinct and adjacent levels of production: (1) aluminum coil prices, and (2) by means of its large market share in aluminum pipe in this local geographic market, aluminum culvert pipe prices.

The jury was instructed that it could find Kaiser and its wholly owned subsidiary liable for a "price squeeze" as part of an unlawful "intra-enterprise conspiracy" in restraint of trade under Section 1 of the Sherman Act, and also as part of an unlawful "intra-enterprise conspiracy" to monopolize, attempt to monopolize, and actual monopolization under Section 2 of the Sherman Act. The jury returned a $5,445,000 treble-damage verdict in Columbia's favor under Sections 1 and 2 of the Sherman Act. (A-70-71). The district court denied Kaiser's motion for judgment n.o.v., but granted a new trial, primarily because of the inadequate and confusing nature of plaintiff's damage proofs. The trial judge limited the new trial to the issue of amount of damages. (A-72).

E. *The Limited Retrial on Damages.*

Under a novel, hybrid trial procedure which involved the district court's reading of a prepared summary of Columbia's liability contentions at the prior trial, and

Columbia's counsel's enlargement on these contentions in an opening statement to the jury, the second jury returned a treble-damage verdict of $9,567,939, *i.e.*, nearly twice the amount of the original verdict returned by the jury that had heard the liability evidence.[8] Observing that much of the apparent prejudice resulting to Kaiser was simply inherent in this unprecedented limited retrial procedure, the trial court denied Kaiser's motion for judgment n.o.v., except with respect to one component of the treble-damage judgment, which the court reduced to $4,651,560. (A- 116). Both sides appealed.

F. *The Second Appeal*

The Third Circuit upheld the first jury's finding of liability, and, reversing the district court, reinstated the second jury's $9,567,939 damage award. The Court rested its affirmance of the liability verdict on evidence purportedly sufficient to support the claims of individual attempt to monopolize and monopolization.[9] It first cited

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8. The district court acknowledged that the jury could not understand the evidence relating to the amount of damages without knowing the liability evidence. The district court stated that simply reading to the limited retrial jury the prior jury's answers to the special interrogatories on liability would have been insufficient, because that verdict did not identify what acts had occurred, which acts were unlawful, which acts had caused injury to Columbia, and what kind of injury they had caused. In spite of the acknowledged need to inform the jury of liability evidence for them to render a reasoned verdict on the issue of amount of damages, the district court held that the facts relating to liability and damages were not "interwoven" and that *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), did not apply. On appeal, Kaiser cited this ruling as an error, but the Court of Appeals affirmed. Judge Adams correctly cited the point as one basis for his vote to grant Kaiser's petition for rehearing.

9. The appeals from the district court's decisions were argued in September, 1983; but before the appeal was decided, this Court granted a petition for a writ of certiorari in *Copperweld Corp.* v. *Independence Tube Co.*,_____U.S. _____, 104 S.Ct. 2731 (1984). The Court of Appeals decided to await this Court's decision in *Cop-*

evidence allegedly establishing that Kaiser "attempted to control its competition" by refusing to deal with Columbia when Columbia switched a major part of its coil purchases to Reynolds and, thereafter, by locating a competing culvert pipe fabricating plant near Columbia. The Court then addressed Columbia's "most serious claim," namely, that (A-14)

> Kaiser deliberately raised the price of the raw materials to the same level as the price [Kaiser] charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser. The plaintiffs term this price condition a 'price squeeze.'

The Court recognized that Columbia's contention concerning Kaiser's control over the raw material prices was "problematic," and noted that Kaiser was not even the largest supplier of aluminum coil to independent culvert pipe fabricators.[10] (A-15). The Court also observed that Kaiser had not supplied Columbia with aluminum coil during the price-squeeze period. However, relying on, and extending the scope of, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), ("*Alcoa*") the Court upheld the Section 2 charge on the ground

NOTE 9 (*Continued*)
perweld. Notwithstanding this Court's opinion in *Copperweld*, the Court of Appeals sidestepped the jury's erroneous Sherman Act §§1 and 2 findings of "intra-enterprise conspiracy." The Court of Appeals did not reach the question whether *Copperweld* means that a parent corporation is also legally incapable of "conspiring" *to monopolize* with its wholly-owned subsidiary within the meaning of Section 2 of the Sherman Act, concluding that the jury finding of liability and the damage award "would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities." (A-11). While Kaiser contended on Petition for Rehearing and still maintain that this holding was erroneous, review and reversal is unnecessary in light of the errors raised by the Questions Presented.

10. In fact, the record is clear that Kaiser was the third largest domestic aluminum coil producer, behind Alcoa and Reynolds.

that the evidence was sufficient to establish that Kaiser was the "price leader" and that the alleged price squeeze, induced indirectly by Kaiser's exercise of "price leadership," was "deliberate." (A-17-18).

In reaching this result, the Court brushed aside the only record evidence of actual coil prices charged by Kaiser and its two larger competitors, Alcoa and Reynolds. Columbia itself introduced into evidence in chart form each price change for aluminum coil by Alcoa, Reynolds and Kaiser during the alleged price-squeeze period beginning in 1974. That evidence demonstrated without contradiction that Alcoa, Columbia's coil supplier, never followed Kaiser's published price changes during the period of the alleged squeeze. Rather, Alcoa set coil prices and sold coil to Columbia at prices substantially below those published by Kaiser. Even Columbia's own expert witness was forced to agree that price leadership "would be difficult to establish from this chart alone." (Court of Appeals appendix, 699a).

The Court of Appeals denied Kaiser's petition for rehearing by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting. Judge Adams, who had written the opinion for the Court of Appeals in the first appeal, expressed the view that the price squeeze holding represented a "substantial expansion" of Judge Hand's holding in *Alcoa* and because of its importance for antitrust policy was one that warranted examination by the Court in banc. (A-4).

REASONS FOR GRANTING THE WRIT

Kaiser respectfully submits that the Court should grant the writ to review the Third Circuit's "price squeeze" ruling, which represents a significant and unwarranted expansion of the *Alcoa* price squeeze doctrine, and threatens to have profoundly adverse

anticompetitive consequences.[11]

Extension of the *Alcoa* price-squeeze doctrine to cases in which an integrated firm lacks unilateral monopoly power in the raw material or "upstream" market, greatly expands the scope of the legal constraints on beneficial vertical integration, a feature of industrial organization that, *inter alia*, strengthens the competitive incentives for producers to promote existing finished products and to develop innovative new finished products.

Even if an extension of the *Alcoa* doctrine were deemed appropriate in certain circumstances, those circumstances would have to be carefully defined. In particular, it is of threshold importance that price-squeeze claims should not be upheld on the basis of alleged "price leadership" in the absence of proof that the integrated firm's upstream market competitors *in fact* followed that firm's prices; or, in any event, in the face of actual price data showing the contrary.

I. PRICE SQUEEZES.

In general terms, a "price squeeze" occurs whenever a firm which is required to purchase its raw material in the market is required by competitive conditions to sell its finished product at a price that is insufficient to cover its raw material costs, its fabrication costs and its selling expenses. The several kinds of "price squeezes" may be classified as follows:

(a) *Normal Operation of Market Forces*. Most price squeezes are wholly innocent and occur simply as a result of the normal operation of market forces. A typical case would be one where demand may increase for many finished products for which a raw material is sold, caus-

11. While the court committed other significant errors (*see e.g.*, footnotes 7 and 8 *supra*), the questions presented are of such importance and so decisive in this case that these other errors need not be addressed.

ing raw material producers to increase their prices. But if demand for a particular finished product has not increased, sellers of that product (including vertically integrated firms) will maintain the price for that finished product or raise it by less than the raw material price increase, thus narrowing the margin between raw material and finished product prices. These kinds of squeezes are more accurately termed "market-squeezes," and may occur whether or not any firm possesses monopoly power in the raw material market.

(b) *Inefficiency.* A non-integrated producer may be relatively inefficient: either its fabrication costs or its selling or overhead expenses may be so excessive that the margin between its cost for raw materials and its finished product price is insufficient to allow a profit. If a vertically integrated firm's costs of producing the finished product are less than those of independent fabricators, a competitive finished product price reflecting the lower costs will "squeeze" the independents.

(c) *Abuse of Monopoly Power in Raw Material Market.* Price squeezes may be "market" or "efficiency" squeezes even where a vertically integrated firm has monopoly power in a raw material market. However, such a firm might employ a price squeeze to gain a monopoly in finished product markets for the purpose of discouraging entry by forcing new entrants to come in at both the raw material and finished product levels.[12]

(d) *Predatory Pricing of Finished Product.* A vertically integrated producer may deliberately sell its finished product in competition with its non-integrated rival at a predatory price below its own costs. This is simply single-product predatory pricing, and can be dealt with by applying the usual predatory pricing rules. No such issue was raised in this case, because Columbia

12. Columbia conceded that Kaiser's position in the finished product market had been lawfully acquired. Consequently, it cannot contend that Kaiser imposed a squeeze for the purpose of gaining a monopoly in that market

conceded that Kaiser had consistently sold culvert pipe above its own costs.

Price squeezes are a frequently recurring economic phenomenon in basic industrial sectors of the economy, and have been especially prevalent in the aluminum, steel, petroleum, electric power, corn products refining, chemical, food packing and distribution, computer, copper, and paper industries.[13] The Court touched on the

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13. George A. Birrell, "The Integrated Company and the Price Squeeze Under the Sherman Act and Section 2(a) of the Clayton Act, As Amended," 32 Notre Dame Law. 5 (1956); Merton J. Peck, *Competition in the Aluminum Industry* 1945-1958 (Harvard Univ. Press 1961) at 72-82 ("The Price Squeeze Upon the Independent Fabricators"); Donald H. Wallace, *Market Control in the Aluminum Industry* (Harvard Univ. Press, 1937) at 379-395 ("The Ingot-Sheet Price Differential"); Robert Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U. Chi. L. Rev. 157 (1954); 163-165; 179-180; 198-199; Simon H. Whitney, *Antitrust Policies: American Experience in Twenty Industries* (Twentieth Century Fund 1958) vol. 1, at 320; vol. 2 at 93, 398; Eugene Singer, *Antitrust Economics* (Prentice-Hall, Inc., 1968) at 212, 215-216, 217-220; Walter Adams, "Vertical Power, Dual Distribution and the Squeeze: A Case Study in Steel," 9 Antitrust Bull. 493 (1964); Senate Small Business Committee, "Monopolistic Practices and Small Business," March 31, 1952 at 53; U.S. Tariff Commission, Hearing, May 7, 1963, Transcript Pages 265-266; "Economic Memorandum by Walter Adams," submitted to U.S. Tariff Commission, May 7, 1963; Walter Adams, "The Steel Industry," in Adams ed., *The Structure of American Industry* (Macmillan Pub. Co. 5th ed., 1971) at 94; *Hearings Before the Joint Committee on the Economic Report*, 80th Cong., 2d Sess., 1948 at 14-15; M. A. Adelman, "Economic Aspects of the Bethlehem Opinion," 45 U. Va.L.Rev. 684 (1959); *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576 (S.D.N.Y. 1958); TNEC Monograph No. 39, "Control of the Petroleum Industry By Major Oil Companies," (1941) at 32 ("The Refinery 'Price Squeeze' "); TNEC Monograph No. 39-A, "Review and Criticism on Behalf of Standard Oil Co. (New Jersey) and Sun Oil Co. of Monograph No. 39 With Rejoinder By Monograph Author" (1941) at 42; Melvin G. deChazeau and Alfred E. Kahn, *Integration and Competition in the Petroleum Industry*, (Yale Univ. Press, 1959) at 221-229, 450-471; Richard B. Manke, "Competition in the Oil Industry," in Edward J.

problem in the electric power industry in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). But the leading decision on the price squeeze in the antitrust context is Judge Learned Hand's landmark opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

NOTE 13 *(Continued)*
Mitchell ed., *Vertical Integration In the Oil Industry* at 63-67; Wesley J. Liebeler, "Integration and Competition," in Mitchell, supra, at 30-32; J. McGee, "Price Discrimination and Competitive Effects," 23 U. Chi. L.Rev. 398 (1956); *see also, FTC v. Standard Oil Co. of Indiana*, Docket No. 4389. *See*, 41 FTC 263 (1945), *modified*, 43 FTC 56 (1946), *affirmed in part and modified in part*, 173 F.2d 210 (1949), *rev'd on other grounds*, 340 U.S. 231 (1951); *on remand*, 49 FTC 923 (1953), *vacated*, 1956 CCH Trade Cas. ¶68,332 (1956); A. Stuart Holmes, "First Generation Price Squeeze Policy at the FERC," 110 Pub. Util. Fort. 32 (1982); John E. Lopatka, "The Electric Utility Price Squeeze As An Antitrust Cause of Action," 31 UCLA L.Rev. 563 (1984); M. Gapinski, "The Applicability of Antitrust Laws To Price Squeezes in the Electric Utility Industry," 54 St. John's L.Rev. 103 (1979); *see also*, Federal Power Commission, Price Squeeze — procedural rules, Docket No. RM 79-79 (issued November 19, 1979); Federal Power Commission, Price Squeeze — substantive rules, Docket No. RM 79-80 (issued November 19, 1979); *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976); *City of Bethany* v. *FERC*, 727 F.2d 1131 (D.C. Cir 1984), *cert. denied*, 105 S.Ct. 293 (1984); *Cities of Batavia, et al.* v. *FERC*, 672 F.2d 64 (D.C. Cir., 1982); *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir., 1981); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307 (3d Cir. 1982); *City of Mishakawa* v. *American Electric Power Co.*, 616 F.2d 976, 983-985 (7th Cir., 1980); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176-1179 (8th Cir., 1982) and cases cited in footnote 8; *City of Chanute* v. *Kansas Gas & Electric Co.*, 1985-1 CCH Trade Cas. ¶66,399 (10th Cir. Opinion Filed February 5, 1985); G. E. Hale and Rosemary D. Hale, *Market Power: Size and Shape Under the Sherman Act* (Little, Brown & Co., 1958) at 205, 229; *United States* v. *American Cyanamid Co.*, 719 F.2d 558, 562, n.5 (2d Cir., 1983), *cert. denied*, 104 S.Ct. 1596 (1984); *United States* v. *Corn Products Refining Co.*, 234 Fed 964 (S.D.N.Y., 1916); *Dimmitt Agri Industries, Inc.* v. *C.P.C. Int., Inc.*, 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Adelman, "Integration and Antitrust Policy," 63 Harv. L.Rev. 27 (1949); *United States* v. *New York Great*

II. THE THIRD CIRCUIT'S DECISION IS A DANGEROUS AND UNWARRANTED EXTENSION OF THE *ALCOA* "PRICE SQUEEZE" DOCTRINE TO NON-MONOPOLY "PRICE LEADERSHIP."

A. *Alcoa* Held That Proof Of Monopoly Power In The Raw Material Is An Essential Element Of A Price Squeeze.

The Third Circuit's decision represents a substantial and unsound departure from existing antitrust "price squeeze" doctrine, as that doctrine was defined in Judge Hand's opinion in *Alcoa* in his discussion of Alcoa's "price squeeze" of independent aluminum sheet fabricators, who bought ingot from Alcoa and fabricated and sold aluminum sheet in competition with it. 148 F.2d at 436-38.[14] In *Alcoa*, the Government's price squeeze contention was "that 'Alcoa' consistently sold ingot at so high a price that the 'sheet rollers' who were forced to buy from it, could not pay the expenses of 'rolling' the 'sheet' and make a living profit out of the price at which 'Alcoa' itself sold 'sheet'." 148 F.2d at 437.

NOTE 13 *(Continued)*
A & P Tea Co., 67 *F.Supp. 626 (E.D. Ill. 1946), aff'd*, 173 F.2d 79 (7th Cir. 1949); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (treating the price squeeze issue under a different rubric); *Franklin Container Corp.* v. *International Paper Co.*, Civil Action No. 77-3204 (E.D. Pa.) (consent decrees protecting non-integrated corrugated container manufacturers from price squeeze by integrated firms).

14. Judge Hand's opinion in *Alcoa* has been accorded special precedential weight. The appeal came before the Court of Appeals for the Second Circuit by virtue of a special statute (now 28 U.S.C. 2109) because, by reason of disqualifications, this Court could not muster a quorum. Accordingly, this Court has said "[t]hat case was decided by the Circuit Court of Appeals under unique circumstances which add to its weight as a precedent," *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946), and has treated it accordingly in later antitrust decisions.

Judge Hand found that, by reason of its status as the sole domestic producer of virgin ingot, and by its "*control over the ingot market*" (which the Court "reckoned at over ninety percent"), Alcoa had monopoly power with respect to the *aluminum ingot market* in the United States. Based on his finding of monopoly power in the ingot market, Judge Hand wrote (148 F.2d at 438):

> "That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than a 'fair price.' True, this was only a consequence of 'Alcoa's' control over the price of ingot. . . [b]ut it was at least an unlawful exercise of 'Alcoa's' power after it had been put on notice by the 'sheet rollers' complaints. . . . We hold that at least in 1932 it had become a wrong."

Judge Hand also expressly found that aluminum sheet fabricators "were *forced* to buy" this ingot from Alcoa. 148 F.2d at 437.

B. The Third Circuit's Decision Is A Substantial And Dangerous Expansion Of The *Alcoa* "Price Squeeze" Theory.

As Judge Adams recognized in his Statement Sur Petition for Rehearing,[15] the Third Circuit's decision in

15. Judge Adams stated (A-4):
"The substantial expansion of the 'price squeeze' theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. See *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not

this case represents a "significant extension" of *Alcoa*. (A-4).

First, the decision below extends the doctrine to impose liability for a "price squeeze" on a company that was not supplying raw material to the independent fabricator allegedly injured by the "squeeze". Kaiser never sold aluminum coil to Columbia after April, 1971. It was not selling coil to Columbia during the period of the alleged pipe "price squeeze" in 1974. Columbia's supplier during the period of alleged squeeze was Alcoa.

Second, the decision below extends the doctrine to impose liability on a producer that did not have monopoly power in the defined raw material market of the "squeezed" independent. There was no proof that Kaiser possessed monopoly power in any relevant "raw material" market. In accepting a price squeeze contention under this relaxed legal standard, the Third Circuit ignored Columbia's failure of proof with respect to each aspect of the critical element of monopoly power in the raw material market. Under the *Alcoa* standard, however, Columbia had to prove that Kaiser possessed monopoly power in a relevant raw material market, just as the Government was required to prove and did prove that Alcoa held monopoly power in the aluminum ingot market.

C. Expansion of the "Price Squeeze" Rule Would Produce Substantial Adverse Competitive Effects.

There are strong antitrust policy reasons for not extending the *Alcoa* price-squeeze theory to non-monopoly cases. Because it tends to inhibit beneficial vertical integration, the *Alcoa* price-squeeze theory of Section 2 liability is itself questionable, even when applied to a monopolist that has integrated forward into a finished

NOTE 15 *(Continued)*

selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw material."

product market.[16] Extending the price-squeeze theory to cases where a vertically integrated firm is only one of several producers in a concentrated raw material industry would greatly magnify those adverse economic effects.

In order to increase sales, producers of a raw material are competitively motivated to promote the expansion of existing finished product markets, and to develop new uses for their products, both entirely new finished products or finished products that compete with other materials. For a variety of reasons a producer of the raw material may wish to accomplish this objective by vertical integration.

Unlike the case of a raw material monopolist, the incentive for a non-monopolist to incur costs of expansion and innovation is curbed by the fact that competing raw material producers may be able to "free ride" on one producer's efforts. Vertical integration in that instance increases the benefits of such expansion and innovation. Vertical integration into production of a finished product may also be necessary or desirable because: (a) a sufficient number of independent fabricators of a new finished product cannot be found; (b) independent fabricators cannot be relied upon to exploit a finished product market; (c) vertical integration may insure that the finished product is competitively priced, leading to greater output of both the raw material and finished product; and (d) there are substantial vertical integration economies.

Vertical integration is, in fact, a principal way in which firms in a concentrated industry compete with one another. Vertical integration in basic industries often has highly desirable economic consequences. As this Court has observed, "Technological advances may easily require a basic industry plant to expand its processes into semi-finished or finished goods so as to produce desired

16. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶729(c).

articles in greater volume and with less expense." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 526 (1948).

To make "price squeezes" subject to antitrust attack in the absence of a raw material monopoly would have the following effects, none of which are pro-competitive or promote consumer welfare. *First*, it would force a vertically integrated firm to incur losses by (a) raising its finished product price to the level sufficient to guarantee a "living profit" to the independent fabricators regardless of their efficiency or lack of it; (b) selling raw material to independent fabricators at prices below those obtainable by sale to other markets; or (c) shutting down its finished-product facilities. Such choices would not only harm the integrated firm but would distort resource allocation and harm consumers as well.

Second, facing the Hobson's choice between exposure to antitrust treble damages and adverse profit effects from partial vertical integration, raw material producers would be much less likely to vertically integrate. This tendency would produce adverse economic consequences whenever vertical integration would promote new or old uses most effectively, or otherwise intensify competition in either the raw material or finished product markets. By discouraging partial vertical integration, an extended price squeeze rule would reduce the rewards, and hence the incentives, for promotion of new and existing finished products, one of the principal avenues by which firms in concentrated industries compete to the benefit of consumers and the economy generally. A loss of invention and service has long been recognized as one of the costs of a rule of law that would limit vertical integration.[17]

The Court should grant the writ to limit this expansion of the conventional antitrust "price squeeze" doctrine. Moreover, as shown below, aspects of the Third

17. Peck, *Competition in the Aluminum Industry 1945-1958*, 126, 200 (1961).

Circuit's "price squeeze" holding cannot be squared with settled antitrust principles concerning definition of market power—an additional reason why the Court should review this multi-million dollar, treble-damage judgment.

III. THE THIRD CIRCUIT'S ECONOMICALLY UNSOUND AND LEGALLY UNSUPPORTED PRICE LEADERSHIP TEST DEMONSTRATES THE PROBLEMS THAT ARISE FROM AN UNWARRANTED EXTENSION OF *ALCOA*.

A. "Price Leadership" Alone Does Not Show Monopoly Power.

The Third Circuit's "price squeeze" holding extends *Alcoa* by equating "price leadership" with monopoly power. Since Columbia did not purchase its raw material from Kaiser during the "squeeze," Columbia was forced to demonstrate that Kaiser somehow "controlled" the raw material prices of Columbia's supplier. In expanding conventional "price squeeze" doctrine, the Third Circuit relaxed the burden of showing monopoly power and based its ruling instead primarily on evidence purporting to show Kaiser's "price leadership."

Price leadership is not synonymous with monopoly power. It falls far short of that power to control prices or exclude competitors which constitutes the classic definition of monopoly power. *See, Dimmit Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 530-31 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). To be sure, a dominant firm in an industry comprised of itself and a number of much smaller rivals may be able to control prices and in that sense be a "price leader." However, there are several reasons why an inference in the opposite direction, from price leadership to monopoly power, does not follow. Price leadership of the "dominant firm" type is not the only kind of price leadership. Price leadership may simply be "barometric," and such baro-

metric price leadership supports no inference of monopoly power.

> Unlike price leadership of the dominant firm type, there is no explanatory hypothesis which identifies the barometric price leader. In contrast to the dominant firm, *the barometric firm "commands adherence of rivals to his price only because, and to the extent that, his price reflects market conditions with tolerable promptness."* Hence, the reasons why a particular firm is the barometric firm must be found in the historical background of an industry and the institutional and other features which have shaped its development. (Emphasis added and footnote omitted).[18]

No sinister inference can be drawn from barometric price leadership:

> For the most part. . . the barometric price leader. . .*appears to do little more than set prices that would eventually be set by forces of competition.*[19] (Emphasis added)

The Court recognized this long ago in *United States* v. *International Harvester Co.*, 274 U.S. 693, 708 (1927), where it said that "the fact that competitors may see proper in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."[20] There is no reasonable inference from

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18. J. Markham, "The Nature and Significance of Price Leadership," 41 Am.Econ.Rev. 891 (1951); see also George J. Stigler, "The Kinky Oligopoly Demand Curve and Rigid Prices," 55 J. Pol.Econ. 432, 444-446 (1947).

19. J. Markham, *supra.*, 41 Am. Econ. Rev. at 899.

20. The Third Circuit purported to recognize that a price squeeze attributable to "natural market forces" is not unlawful, but its conclusion that the "squeeze" that purportedly affected Columbia was not such a "market squeeze" was based on defective reasoning. (A-14) Among other things, the Court's statement that

price leadership by a firm, without more, to monopoly power. Indeed, in many industries the price leader is not even the largest firm. Evidence of price leadership alone is economically ambiguous at best.[21]

Columbia's economic expert agreed that Columbia's price squeeze contention required something more than price leadership: it required dominance in a raw material market. (Court of Appeals appendix at 590a-92a). The expert was permitted to assume, subject to "later connection," that Kaiser was "dominant in a market for aluminum coil." (Court of Appeals appendix at 622a). Columbia's counsel initially acknowledged Columbia's burden to prove (a) the existence of a relevant raw material product market, (b) a relevant raw material geographic market, and (c) Kaiser's alleged "domination" of it by something more than evidence of some loose kind of "price leadership." But Columbia never supplied the promised "connection," and the Third Circuit's ruling relieved it of the obligation to do so.

B. Price Leadership Is Economically Meaningless Without a Definition of a Relevant Market.

In abandoning the normal requirement of proof of monopoly power, and permitting price leadership as a surrogate, the Third Circuit also lost sight of the initial necessity for definition of a relevant market as a context for assessing power within that market. Just as a finding of monopoly power is dependent on definition of a relevant market, the antitrust significance of price leadership can only be determined by reference to a relevant market. The Third Circuit's decision conflicts with controlling authority uniformly holding that proof of monop-

NOTE 20 *(Continued)*
Kaiser's raw material price increase was "not related to costs" entirely overlooked the fact that a price increase may reflect a normal competitive response to increased demand, quite apart from any increase in costs. (A-18).

21. J. Markham, *supra*, 41 Am. Econ. Rev. at 896.

oly power, *i.e.*, the power to control prices, first requires proof of both a relevant product market and a relevant geographic market. *See, United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E. I. duPont de Nemours and Co.*, 351 U.S. 377, 391 (1956).

The Third Circuit's decision conflicts with these established precedents. Although it acknowledged that the "plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic," and noted that "Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators," the Third Circuit nonetheless adopted Columbia's theory "that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy." (A-15). It reasoned that since Kaiser "sold over 80 percent of the aluminum *pipe* in the country" (A-16), and since Kaiser used its own coil in its pipe, it would be "most likely" that Kaiser set the pricing policies for aluminum coil. (A-16). But Columbia adduced no evidence during the trial, and the Court cited none, that aluminum coil sold to culvert pipe fabricators constituted the relevant product market, and no evidence that "the country" constituted a relevant geographic market. What evidence there is points to a broad market, not one limited to coil sold to culvert fabricators. The vast bulk of Kaiser's output of the coil of the same alloy as culvert coil is for cans and other uses. For example, Kaiser produced 250 million pounds of can coil, but only 25 million pounds of culvert coil annually. (Court of Appeals appendix, 2374a-76a).

Judge Adams in the first appeal held that Columbia had failed to sustain its burden of showing a relevant raw material market. He said (A-147):

> "Here, no evidence was adduced to show whether the output of the facilities which produced the aluminum sheet and coil for the culvert industry could be or was used to manufacture material sold

only to fabricators of aluminum culvert pipe. Since this is so, there was insufficient evidence to demonstrate whether aluminum sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce."

Since the same price was published for coil of the same alloy, regardless of the finished product market into which it was sold, it was most unlikely that Kaiser would be the price leader. The Court's analysis is seriously flawed because it dispensed with relevant market criteria. Price leadership has no significance except in the context of a definition of relevant product and geographic markets.

C. Price Leadership Cannot Be Proven by Uncontradicted Evidence Showing Substantial Differences in Competitors' Raw Material Prices and in the Timing of Their Price Changes.

Even if it were deemed appropriate, moreover, to apply Section 2 to some "price squeezes" involving "price leadership" by a non-monopoly firm, the threshold condition for finding illegality should be clear proof that defendant's competitors in fact followed defendant's prices to independent fabricators. The Third Circuit's opinion requires none. The only actual price data in this case, which the plaintiff itself put in the record, negate price leadership.

Columbia put into evidence each price change for aluminum coil during the period 1969 through 1978 by Kaiser, Alcoa and Reynolds. During the period of the alleged price squeeze beginning in 1974, the uncontradicted evidence showed that Kaiser changed its coil prices a total of 16 times. Not once did Alcoa follow. Reynolds published a similar price only once. Columbia's own expert conceded in guarded fashion that it "would be difficult to establish [price leadership] from this chart

alone." (Court of Appeals appendix, 699a). But the chart was Columbia's only evidence of coil prices.

Moreover, Columbia's price evidence showed no price similarity for coil among Alcoa, Reynolds and Kaiser during the period of the alleged price squeeze. Alcoa's coil prices were significantly lower than Kaiser's. According to Columbia's chart, the disparity between Alcoa's and Kaiser's coil prices was normally in the range of 3 to 6 cents per pound, and often as much as 10 cents per pound. Columbia introduced evidence that one-half of one cent per pound was a significant and substantial difference in the price for coil. Thus, during the entire period of the alleged price squeeze beginning in January of 1974, Kaiser's prices were substantially different and were higher than the prices published and quoted by Alcoa, who was Columbia's sole supplier of coil during the period of the alleged price squeeze.

Although the Third Circuit correctly observed that "Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership," (A-17) it erroneously held that it was sufficient to form the foundation for the Court's price squeeze holding.

It is of vital importance that this Court grant certiorari and reverse the erroneous Third Circuit price leadership ruling.[22]

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22. With the price-squeeze claim removed, there is no basis left for Columbia's Sherman Act §2 claim. With respect to the four remaining acts alleged to establish a violation:

1. The district court, in a ruling not contested by respondents on appeal, dismissed the claim regarding Kaiser's persuading Columbia to install a particular pipe-making machine.
2. Kaiser's alleged refusal to deal with Columbia obviously caused no harm because Columbia had other and cheaper sources of supply. Moreover, the dismissal of plaintiffs' Clayton Act §3 claim removed the basis for a contention that Kaiser's effort to obtain a requirements contract from Columbia was unlawful.
3. Kaiser's location of a pipe fabricating plant in Columbia's territory was a legitimate response to Columbia's turning to

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted to limit the *Alcoa* "price squeeze" doctrine to monopolists of the raw material or at least to require clear proof of monopolistic price leadership. In the course of review, the Court may wish to examine the soundness of the *Alcoa* price squeeze doctrine as formulated by Judge Hand.

Respectfully submitted,

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other coil suppliers, which deprived Kaiser of an outlet for its coil in the geographic market concerned.

4. Kaiser's appointment of Kennedy, Columbia's former salesman, as an independent distributor of Kaiser-manufactured pipe could in no way suffice to establish a Section 2 violation e ·en if, as claimed by Columbia, Kennedy was a credit risk.

84-1907

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No.

IN THE

Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of the Court of Appeals Sur Petition for Rehearing and Statement of Adams, J., Sur Denial of the Petition for Rehearing In Banc

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1047 and 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY and ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D. C. No. 74-0122)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellees and cross-appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/ Seitz

Circuit Judge

DATED: March 8, 1985

Judge Becker would grant rehearing limited to the price-squeeze issue.

STATEMENT OF ADAMS, J., SUR DENIAL OF THE PETITION FOR REHEARING IN BANC

I respectfully dissent from the order denying rehearing in banc, because I believe that this case raises a number of issues of sufficient import to command the attention of the entire Court.

First, I believe there is a serious question whether Kaiser's contentions regarding the applicability of the Supreme Court's recent decision in *Copperweld Corp. v. Independent Tube Co.*, 104 S.Ct. 2731 (1984), have been properly answered. *Copperweld*, handed down after the trial but before the decision of the panel, holds that a parent and a wholly-owned subsidiary are not considered separate entities for purposes of a conspiracy charge under section 1 of the Sherman Act, 15 U.S.C. §1. If there can be no intra-enterprise conspiracy under section 1 of the Sherman Act, Kaiser asserts that logic dictates a similar result under section 2 of the Sherman Act. If Kaiser is correct, then the propriety of the jury's verdict which relied in part on such a conspiracy is called into question.

Second, the bifurcation of the trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 495 (1931). This Court has recently recognized the continued vitality of *Gasoline Products* — that retrial of only one issue in a case, such as liability, is not proper unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576 (3d Cir. 1983), the Court emphasized the danger of separate trials on damages and liability, particularly when there is evidence, as here, that the first jury reached a compromise verdict. This is illustrated by the fact that the first jury returned a damage verdict of $5,445,000 when tre-

bled and the second jury returned a verdict of $9,567,939 when trebled.

Finally, the substantial expansion of the "price squeeze" theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw materials.

Each of these important issues would appear to warrant further attention by the entire Court.

A True Copy:

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APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1047 and No. 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY and ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. No. 74-0122)

Argued: September 13, 1983

Before: SEITZ, GIBBONS and ROSENN,
Circuit Judges.

(Opinion Filed: December 27, 1984)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

The plaintiffs appeal from an order of the district court partially granting judgment notwithstanding the verdict which eliminated the largest element of the jury's damage award in an antitrust action. The defendants, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc. (collectively "Kaiser") cross-appeal from a judgment entered after a special jury verdict finding them in violation of the antitrust laws. This court has jurisdiction under 28 U.S.C. §1291 (1983).

II. BACKGROUND

The plaintiffs were the sole stockholders of the now defunct Columbia Metal Culvert Co., Inc. ("Columbia") which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. They allege that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of sections one and two of the Sherman Act, 15 U.S.C. §§1 and 2 (1983).

Columbia began to manufacture aluminum drainage pipe in 1962. Originally, Columbia purchased all of its raw materials from Kaiser. The raw material for manufacturing pipe comes in two primary forms: corrugated aluminum sheet which is rolled and riveted into pipe, and aluminum coil which is formed into helical pipe by a spiraling machine. Initially, Columbia purchased only sheet, but in 1970, it acquired a spiraling machine, and thereafter produced mostly pipe formed from coil.

In 1972, Columbia and Kaiser had a falling out, after which Kaiser no longer sold coil to Columbia, which thereafter purchased its raw materials from Alcoa and Reynolds. In 1973, Columbia's best salesman, Robert Kennedy, left Columbia to become an independant distributor of Kaiser's aluminum pipe. At the same time, Kaiser opened a pipe fabrication plant only a few miles from Columbia's. In 1974, Kaiser along with the other major aluminum producers raised the prices of aluminum coil and sheet to roughly the same price that Kaiser charged for the finished pipe. Throughout this period, Kaiser produced approximately 80% of all the aluminum pipe used in Columbia's geographical marketing region.

The plaintiffs allege that as a result of Kaiser's conduct, Columbia began experiencing financial difficulties, and stopped producing pipe in 1975. Eventually, Columbia's assets were sold to a third party in 1978. In 1981, the third party sold the remaining assets of Columbia to Kaiser.

This action was first filed in January of 1974 under section four of the Clayton Act, which gives a private cause of action under the antitrust laws, alleging, inter alia, violations of sections one and two of the Sherman Act. At the first trial in 1977, the district court directed a verdict for Kaiser at the conclusion of plaintiff's evidence. This court reversed, holding that there was sufficient evidence to permit the case to go to the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). A second trial held in 1979 resulted in a jury verdict for the plaintiffs and an award of damages. The district court, however, granted in part the defendants' post-trial motion for a new trial by ordering a trial on damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F.Supp. 102 (E.D. Pa. 1981). A limited retrial was conducted in 1981, resulting in a damage award of $9,567,939 after trebling. The district court then granted, in part, the defendant's motion for judgment notwithstanding the verdict, reducing the judgment to $4,651,560.

The plaintiffs appeal the reduction of the damage award, and the defendants cross-appeal the failure of the district court to grant a new trial or to grant in full their motion for a judgment notwithstanding the verdict. We turn first to the defendants' cross-appeal.

III. The Doctrine of Intra-Enterprise Conspiracy

The defendants contend that the jury verdict must be set aside and a new trial ordered because of the recent decision in *Copperweld Corp. v. Independence Tube Co.*, ___ U.S. ___, 104 S.Ct. 2731 (1984). In that case, the Supreme Court held that a parent corporation and its wholly owned subsidiary cannot be considered separate entities for purposes of section one of the Sherman Act. Thus, a parent corporation and its wholly owned subsidiary cannot by themselves violate that provision which

requires concerted action by at least two participants. Because the two entities in the section one claim in this case are the Kaiser Aluminum & Chemical Corporation ("KACC") and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. ("KACSI"), the defendants contend that the finding of liability must be set aside if the *Copperweld* rationale is applicable to this case.

This court had previously held that the plaintiff could proceed with a section one claim based on a conspiracy between the parent KACC and its subsidiary KACSI. 579 F.2d at 33-35. After oral argument was heard on this appeal, the Supreme Court granted the petition for certiorari in the *Copperweld* case. The parties were asked to submit supplemental briefing on the potential effect of *Copperweld*. After due consideration, we decided to defer resolution of this appeal until after the Supreme Court decided *Copperweld*.

Having now considered the decision of the Supreme Court, we believe that it is unnecessary to reach the issue of the applicability of *Copperweld* because the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy. Kaiser contends that when a verdict may rest on either of two claims, one supported by the evidence and the other not, a judgment thereon must be reversed. *See Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979). The case that Kaiser cites, *Simko*, rested on a general verdict in which it is impossible to determine if a jury found the defendant liable on both grounds or only one ground. In this case, special interrogatories were submitted to the jury on each of the theories of liability, and the jury determined that the defendants violated both section one and section two of the Sherman Act. Under these circumstances, we are not required to remand for a new trial solely because the section one claim may be invalid.

The defendants argue, however, that the causation of damages from the monopolization and attempt to monopolize verdicts are also tainted by the theory of intra-enterprise conspiracy. The jury returned separate verdicts against the defendants for monopolization, attempt to monopolize, and conspiracy to monopolize under section two. Although the conspiracy verdict, which depended upon an intra-enterprise conspiracy, was separately rendered, only a single interrogatory was asked as to causation of injury. The jury answered "yes" to the question: "[W]as any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of the plaintiff?"

The defendants contend that *Copperweld* must necessarily apply to a section two conspiracy to monopolize, and since the jury was not asked separate questions on proximate cause, it is impossible to determine if the jury found that the injuries were caused by an impermissible theory of liability. The defendants' contentions succeed only if it were possible that the jury could infer that some of the plaintiffs' injuries resulted solely from the conspiracy and not from the monopolization or attempt to monopolize. Assuming without deciding that *Copperweld* applies to a section two conspiracy, we conclude that it was not possible for a reasonable jury in this case to find that injury was caused by conduct pursuant to the conspiracy that was not also conduct in furtherance of the monopolization or the attempt to monopolize.

Specific intent is an element of a conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982). Because the jury was charged that it had to find that there was a specific intent to monopolize before returning a verdict on conspiracy to monopolize, the jury necessarily found that both the parent KACC and the subsidiary KACSI had the specific

intent to monopolize the aluminum pipe market. Thus any concerted activity undertaken in the conspiracy that could give rise to damages would have been undertaken with the purpose of monopolization. Because the conspiracy defendants are the same defendants in the monopolization and attempt to monopolize charges, any activity in the conspiracy, which must have had the purpose of monopolization, would necessarily be attributable to the same defendants as part of the monopolization or attempt to monopolize.

Furthermore, the defendants do not point to any evidence in the record that evinces actions in the conspiracy that could give rise to damages and that are not necessarily part of the attempt to monopolize or the monopolization. Thus, under the particular circumstances of this case, we conclude that the jury verdict and award of damages would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities.

IV. The Monopolization Claim

A. The Effect of This Court's Decision in 1977

We next turn to Kaiser's contention that its motion for a judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support the claim of monopolization or attempt to monopolize. The plaintiffs argue that Kaiser may no longer raise this issue because this court had determined on the appeal from the first trial that there was sufficient evidence of monopolization to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

The evidence presented at the liability 1979 trial, however, differed in several material respects from the evidence presented at the first 1977 trial. In particular, the plaintiffs' evidence at the later 1979 trial significantly undercut the economic significance of the facts that the

parent KACC charged its subsidiary KACSI a price for aluminum sheet and coil that was well below the market price while at the same time KASCI was selling coil to independent pipe fabricators at the higher market price. Kaiser's pricing policies with respect to its subsidiaries and to independent fabricators were elements of our earlier decision. 579 F.2d at 31.

Because there were material differences in the evidence presented at the two trials, we believe that the question of the sufficiency of the evidence presented at the 1979 liability trial is still open for review. *See Johnson v. Bernard Ins. Agency, Inc.*, 532 F.2d 1382, 1384 (D.C. Cir. 1976).

B. Sufficiency of the Evidence of Monopolization

There are two main elements in monopolization: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966); *Borough of Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982).

Kaiser's contentions on liability in this appeal go to the question of whether there is insufficient evidence that its alleged conduct demonstrates the willful acquisition or maintenance of monopoly power.[1]

In reviewing a record for sufficiency of the evidence, this court must expose the evidence to the light most favorable to the non-movant with the advantage of every fair and reasonable inference. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962);

1. In this appeal, Kaiser does not contest that the relevant product market is aluminum drainage pipe, or that the relevant geographic market is the Mid-Atlantic states. Nor do any of the issues raised by Kaiser in this appeal relate to whether it possessed monopoly power or whether that power was a consequence of a superior product, skill, or historical accident.

Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

1. *Kaiser Attempted to Control Its Competition.* There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser. Mr. Bonjorno of Columbia, and Mr. Arvay of U.S. Aluminum, a South Carolina fabricator, both testified that Kaiser attempted to coerce the fabricators into purchasing only from Kaiser. There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia. Finally, there was evidence that Holmes Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.[2] *Schine Theatres v. United States*, 334 U.S. 110, 119

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2. Further evidence of Kaiser's attempt to control or exclude competition lay in the veiled threats that Holmes Collins made to

(1948) (threat of opening theatres by a monopolist is evidence of intent) (*Copperweld, supra*, overruled the section one charge in *Schine*, but re-affirmed the section two charge).

2. *Kaiser's Actions to Destroy Columbia.* In addition to locating a plant near Columbia's, the plaintiffs allege that Kaiser engaged in a series of deliberate acts to drive Columbia out of the pipe market. The most serious claim is that Kaiser deliberately raised the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser. The plaintiffs term this price condition a "price squeeze."

The evidence and the record show that for a significant period of time in 1974, the distributor list price of Kaiser's aluminum pipe, per pound, was just above, or even below, the market price for aluminum coil. The mere existence, however, of a "price squeeze" is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants deliberately produced the effect, sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was not the result of natural market forces such as supply and demand or legitimate competition. *Cf. California Computer Prods. Inc. v. IBM*, 613 F.2d 727, 735 (9th Cir. 1979).

To show that the price squeeze was a deliberate act on the part of Kaiser, the plaintiffs produced evidence that Kaiser controlled both the price of the raw material and the price of the finished pipe, and that Kaiser exercised that power. That Kaiser could control the price of the finished pipe is evident. By setting the price at which

NOTES *(Continued)*

Alcoa. Alcoa's manager testified that Collins stated that "if [Alcoa] thought that [it] could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, [Alcoa] had another thing coming, or some words to that effect." App. at 1085.

it sold to distributors, Kaiser effectively controlled the prices at which the distributors bid to contractors. Further, because of Kaiser's large market share, it was likely that it or one of its distributors would be bidding on nearly every job. In this fashion, Kaiser, if it desired, could keep the prices of the pipe low.

The plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic. In part, it lies in understanding the nature of the market for aluminum coil and sheet used in fabricating pipe. Prior to 1974, Kaiser and some of the other aluminum producers maintained a separate price list, called a commodity price, for aluminum alloy sold to fabricators to manufacture pipe. The commodity price was usually lower than the general or specification price charged for the same alloy used for other purposes. It was never contended, however, that Kaiser lost money at the lower commodity price, and KACSI usually reported a profit from the sale of coil and sheet at the commodity price. App. at 4674-4824.

Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators, although if the aluminum used by its own pipe plants were included, it produced over 80% of the aluminum used for making pipe. Kaiser contends that since it was not the dominant force in the commodity price market for aluminum coil and sheet, it did not control the prices of the raw materials. The plaintiffs' theory, however, was that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices.

The principal evidence in support of this theory was the testimony of Professor Oliver Williamson, an economist and expert in antitrust. He testified that the aluminum industry was an oligopoly limited to a few major producers of aluminum, and that in particular lines of aluminum products, one of the producers became dom-

inant and set the pricing strategy for the rest of the industry. He indicated that the other aluminum producers usually followed the price leader because if an aluminum producer did not comply, it would not be followed in the areas where it was dominant. He further indicated that there were economic studies that tended to show that the price leadership phenomenon was especially noticable during the early to mid-1970's and that aluminum prices were kept high by the producers during the relevant period.

Further, Dr. Williamson testified that he believed that Kaiser was the dominant firm in setting the prices for aluminum coil and sheet used in making pipe. Dr. Williamson's opinion that Kaiser was the dominant firm in the aluminum pipe area was buttressed with evidence that showed that Kaiser was the largest producer of coil used for pipe, that it was the only major manufacturer who had an extensive marketing and engineering staff who actively promoted and studied the uses of aluminum pipe, and that Kaiser had the largest interest in pipe prices because it sold over 80% of the aluminum pipe in the country. If there were price leadership, it would be most likely that Kaiser set the pricing policies because of its extensive expertise and investment, rather than Reynolds or Alcoa who had so little involvement in the area.

That there was price leadership was supported by the testimony of Thomas Melrose, a manager at Alcoa, and Lonsdale Lawrence, an engineer from Reynolds. Melrose testified that Alcoa did not independently set prices but followed the prices that Kaiser and Reynolds set for the corrugated aluminum sheet used for making pipe. Lawrence testified that for corrugated sheet, Reynolds would follow Kaiser's announced prices each time the prices changed. Although Melrose's and Lawrence's testimony was in reference to corrugated sheet and not to coil, their testimony confirms Dr. Williamson's general observations on the existence of

price leadership in the aluminum drainage pipe raw material marker. Further, the evidence indicated that the prices for coil and sheet as raw materials for pipe did not differ in material respects.

Kaiser contends, however, that the plaintiffs' documentary evidence on the actual prices charged by the three major manufacturers failed to show price leadership. In particular, Kaiser points to evidence that on one occasion Alcoa raised the price of aluminum coil three days before the effective date of Kaiser's comparable price change as proof that Alcoa, and not Kaiser, was the price leader.

Dr. Williamson testified, however, that a pricing change did not have to be initiated by the price leader. Also, Alcoa's price change, although occurring three days before the effective date of Kaiser's change, may have been made after Kaiser announced its change either publicly or privately.

At most, Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership. When contradictory inferences can be drawn from the evidence, the question should be resolved by the jury and it is not a matter for the consideration of the court on a motion for a JNOV. Given that Dr. Williamson's opinion was well supported by the evidence, we cannot say that the question of price leadership should not have gone to the jury.

The next question is whether the evidence shows that Kaiser deliberately manipulated the coil and pipe prices to create a squeeze. There was evidence that the squeeze was not caused by natural market forces.

The most significant evidence of deliberate manipulation of the coil prices was Kaiser's withdrawal of the commodity price for coil in January of 1974. This caused a steep rise in the price of coil from about 38 cents per pound to about 44 cents per pound. At approximately the same time, Alcoa and Reynolds raised their coil prices to the same price levels. Dr. Williamson testified that he

believed that the price hike was made for "stragetic" reasons. Even Kaiser's manager, Holmes Collins, testified that the commodity price was withdrawn because Kaiser no longer wished to sell to independent fabricators. Thus, Collins' testimony supported an inference that the price change was not related to costs but was intended to affect the independent competition.

Perhaps some of the strongest evidence that the price squeeze was deliberate lies in the relationship of the price of coil charged by Kaiser and its distributor price for pipe. If the coil prices charged by KACSI truly reflected the cost of the coil plus a fair return, then the price of the finished pipe should be higher by at least the fabrication cost of the pipe. However, the price of the pipe was often below the price of the coil during the first six months of 1974. Alternatively, if the price of the pipe reflected Kaiser's true costs plus a fair return, then the price of the raw material should be less by at least the cost of the fabrication. Thus, either the pipe prices were too low, or the raw material prices too high.

Further evidence that the price squeeze was deliberate lay in the transfer price system used by Kaiser. The transfer price is the price that the parent KACC charged its subsidiary KACSI for aluminum. The transfer price was a fixed price per pound that is set once a year and reflects the projected direct costs of producing the aluminum and excludes an allowance for corporate overhead. As such, the transfer price is usually well below the market price. Although the transfer price system itself is not evidence of classic predatory behavior, Kaiser's system permitted KACSI to set coil prices for its competitors without affecting its pipe costs. Usually, the market price of the raw materials determines the price of the finished product. In this case, Kaiser could set whatever market price it chose for the raw material, within certain limits, without directly affecting its market price for pipe.

Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the

power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

There is additional evidence that Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor. There is evidence that Kaiser extended credit to Kennedy even though its credit department concluded that Kennedy's operation was an "unacceptable credit risk." App at 4466. The jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business. *See Columbia*, 574 F.2d at 31. *Cf. Greyhound Computer v. IBM*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (If a jury concludes that a manufacturer possesses monopoly power, then it would be precluded from otherwise lawful practices that exclude competition). Although Kaiser contends that the credit department did eventually approve of the Kennedy account, the evidence indicates that during the first year, Kaiser extended Kennedy up to at least $78,000 credit secured by no more than Kennedy's $25,000 letter of credit and by a security interest in the accounts receivable, which was not much more than the security earlier evaluated by the credit department as unacceptable. App. at 4466.

Further, contrary to Kaiser's contentions, we do not consider that Kennedy's dismissal as a defendant renders the evidence of Kennedy's activities irrelevent to the monopolization claims against Kaiser. The district court's instructions in this regard were fully consistent with this court's earlier opinion. *See Columbia*, 579 F.2d at 31, 36.

When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have

crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62 Colum. L. Rev. 930, 934 (1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.[3]

V. Contradicting Evidence Presented at the Liability and Damage Trials

Kaiser also contends that a judgment notwithstanding the verdict (JNOV) should have been granted because the plaintiff produced evidence at the trial on damages that contradicted the evidence presented at the liability trial. Kaiser, however, fails to explain the legal theory supporting its contention.

Normally, when the evidence is contradictory, a JNOV is inappropriate. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977). The assumption is that the jury should decide factual issues involving contradictory evidence. In this case, however, no single jury heard all of the allegedly contradictory testimony. Kaiser's argument must be that if a single jury had heard both the evidence on liability and damages, then that jury would not have returned a verdict against Kaiser. Under this theory, however, a JNOV is not the proper remedy in this case. There was sufficient evidence of monopolization to go to the jury, even if, as Kaiser contends, the plaintiff's introduced evidence that was inconsistent with their theory of liability.

The proper remedy, at best, would be a new trial on both liability and damages. Kaiser, however, does not ar-

3. Kaiser does not contend on this appeal that there was insufficient evidence as to any issues, such as specific intent to monopolize or a dangerous probability of achieving monopoly power, that relate solely to the attempt to monopolize claim. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975).

gue for a new trial on the ground that testimony inconsistent with the theory of liability was introduced at the damages trial.

Even if we were to construe Kaiser's arguments for a JNOV as a request for a new trial in the alternative, we do not believe that substantial justice dictates that a new trial be ordered. *Cf. Scott v. Plante*, 641 F.2d 117, 136 (3d Cir. 1981), *vacated on other grounds*, 458 U.S. 1101 (1982). If the district court committed error, it would have been in its failure to order a full new trial in 1981 when it ordered the limited retrial on damages. In general, the ordering of a new trial is committed to the sound discretion of the district court. In this case, we cannot say that the district abused its discretion. The liability trial was properly conducted and there was no need to expend further judicial resources retrying liability.

In some situations, however, the seventh amendment right to a jury trial is implicated if the issues in the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately. *Gasoline Prods. Co. v. Champlin*, 283 U.S. 494, 500 (1931). In this case, it might be argued that the issues are interwoven if the theory of damages relied upon was inconsistent with the liability theory, thus requiring a single jury to resolve the inconsistency. We believe, however, that the issues are not interwoven because the theory of damages was consistent with the theory of liability.

Kaiser claims that Dr. Bowman, the plaintiffs' expert witness at the damages trial, contradicted the theory that the price squeeze was deliberately caused by Kaiser and not the result of natural market forces. First, Dr. Bowman testified that he could estimate a free market price for pipe by using the price of coil as a base figure and then adding to the coil price a certain percentage of the base figure to account for fabrication costs and a reasonable profit. In choosing a base figure, Dr. Bowman used the actual coil prices charged by Alcoa and Reynolds

from 1973 to 1977. Thus, Kaiser charges, the implication of Dr. Bowman's testimony is that the coil prices would have been the same in a free market. However, the theory of liability was not that the prices of the raw materials were too high, but that Kaiser deliberately caused a price squeeze condition. The jury did not find that there was a price conspiracy among Kaiser, Alcoa, and Reynolds. The plaintiff was entitled to show that in a free market, either the pipe prices would have been higher or the raw material prices lower during the period of the price squeeze. In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. *See Litton Systems v. American Telephone and Telegraph Co.*, 700 F.2d 785, 822-23 (2d Cir. 1983), *cert. denied*, ____U.S.____, 104 S.Ct. 984 (1984). Dr. Bowman anchored his theory to the actual prices of coil over a five year period. If he had constructed a hypothetical price for coil to calculate a hypothetical price for pipe, his theory would have been far more speculative. Under present circumstances, we do not believe that the implications of Dr. Bowman's testimony were so inconsistent with the plaintiffs' theory of liability as to warrant a new trial.

The second set of statements that Kaiser alleges contradicts and disproves the price squeeze theory was a statement by Dr. Bowman that the free market price of pipe from 1973 to 1977 would have been "substantially similar" to the actual prices for pipe charged by Kaiser. Dr. Bowman, however, testified also that actual pipe prices were "depressed" and "tended to be lower" than this hypothetical free market pipe prices. App. at 6520 and 6531. If actual pipe prices were lower than the hypothetical prices, then his testimony was consistent with the liability theory. The only inconsistency is that Dr. Bowman appeared to contradict himself when he testified that the prices were "substantially similar."

Dr. Bowman's statements are not necessarily inconsistent. His statements applied to a five year period of time. Pipe prices may have been fair over a five year period and still have been depressed during the shorter time period involved in the price squeeze. Further, even if Dr. Bowman's testimony was internally inconsistent, it was an inconsistency entirely before the damages jury. Dr. Bowman's credibility was properly before the damages jury and is not grounds for a new trial.

VI. Bifurcation of Trial on Liability and Damages

Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separately from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. *See REA v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir.), *cert. denied*, 434 U.S. 923 (1977). The liability jury properly found causation from only those acts which could evince the defendant's willful acquisition or maintenance of a monopoly. *See Brunswick Corp. v. Pueblo Bowling Mat, Inc.*, 429 U.S. 477, 489 (1977). In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what act caused which injury as long as the damages are not based upon speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983), *cert. denied*, ____U.S. ____, 104 S.Ct. 234 (1983).

Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The

plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business. When the antitrust injury is of an indivisible nature, the courts have permitted a relaxed standard of proof in calculating damages. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-67 (1981); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962). When the antitrust injury is of an indivisible nature, and the jury properly found that that injury was caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

VII. Prejudicial Conduct During the Damages Trial

Kaiser contends that the conduct of the damages trial was prejudicial to Kaiser because the jury was informed about some of the anticompetitive acts alleged by the plaintiff. It is of course necessary, when conducting a bifurcated trial before two juries, to inform the second jury about some of the evidence and results of the first trial. *MCI v. American Tel. & Tel. Co.*, 708 F.2d at 1168. This is not to say that the second jury was to evaluate or decide factual issues that were involved in the first trial. In this case, antitrust matters are extremely complex, and it would have been unfair not to give the jury some background material on the trial. Questions of trial conduct are committed to the discretion of the trial court. The trial court attempted to conscientiously balance the need of the jury to know about the case and prejudice to

the defendant. We believe that the district court acted in an exemplary manner in its conduct of an extremely long and complicated trial and did not abuse its discretion in permitting the jury to hear some explanation of the finding of liability.

Kaiser also contends that plaintiffs' counsel repeatedly flouted the district court's rules and referred to prejudicial matters. The district court, after reviewing the entire record, concluded that it was not sufficiently prejudicial to warrant a new trial. We find no abuse of discretion. *See Pitchford v. Pepi*, 531 F.2d 92, 106 (3d Cir.), *cert. denied*, 426 U.S. 926 (1976).

VIII. The Calculation of Damages

With respect to the separate trial of damages, Kaiser raises several issues. First, Kaiser contends that its motion for JNOV should have been granted because the projected market share analysis used for plaintiffs' calculation of lost profits failed to account for competition by other independent pipe fabricators. Kaiser further contends that the failure of an expert to account for significant factors in his analysis was an error of law and subject to plenary review in this court. Presumably, Kaiser must be suggesting that the testimony of plaintiff's expert is inadmissible because it is unsupported; and if it were struck, then the remaining evidence would be insufficient to support the damages verdict and Kaiser would be entitled to a JNOV.

We note that Kaiser neither raised this issue specifically in a motion for a directed verdict, nor did it object to the jury instructions on this matter. Thus, Kaiser is not entitled to a JNOV, nor may it raise this issue on appeal as an error of law. *See infra Section IX*, Fed. R. Civ. P. 50(b), 51; *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3513 (1984); *Herman v. Hess Oil*, 524 F.2d 767 (3d Cir. 1975).

Even if, however, we were to construe Kaiser's motion for a directed verdict to have raised this question, we would not hold that the JNOV should have been granted. The testimony of Dr. Bowman made clear that he was aware of, and accounted for the presence of other aluminum pipe fabricators. His testimony was supported, and therefore, admissible. At best, Kaiser's contentions go to the weight of the evidence and not its admissibility. That, however, was for the jury. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108-09 (3d Cir. 1976).

As to Kaiser's remaining contentions on damages, we have examined the record and conclude that the district court did not err in allowing damages for both lost profits and actual losses; nor did the district court err in failing to instruct the jury on plaintiffs' duty to mitigate damages; nor did the district court err in permitting the jury to consider damages for lost profits on projected sales outside of the geographic and product markets stipulated for liability purposes.

IX. The Plaintiffs' Appeal

The district court granted, in part, Kaiser's motion for JNOV as to one aspect of damages. It eliminated the jury award for diminution of going concern value as inappropriate as a matter of law when Columbia had not literally gone out of business as of the date used in the damage calculation.

The plaintiffs contend on their appeal that a grant of a JNOV was improper when Kaiser failed to assert this ground in its motion for a directed verdict at the close of all the evidence. *See* Fed. R. Civ. P. 50(b). Kaiser made an oral motion for a directed verdict at the conclusion of all the evidence on damages. Kaiser specifically asserted three grounds for a directed verdict: (1) the evidence failed to show that the Columbia was injured by Kaiser; (2) the damage calculations included projected sales outside of the stipulated geographic market; and (3)

there was insufficient evidence of a price squeeze. Kaiser never raised in its motion for a directed verdict the contention that damages based on a diminution of going concern value may not be awarded in this case.

The specific grounds for a JNOV must be asserted in the motion for a directed verdict. *Abraham v. Pekarski*, 728 F.2d 167, 172 (3rd Cir.), *cert. denied*, ____U.S.____, 104 S.Ct. 3513 (1984). If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue. *Id. See also Mallick v. IBEW*, 644 F.2d 228, 233-34 (3rd Cir. 1981); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035-36 (1st Cir. 1984); *U.S. Industries, Inc. v. Blake Const. Co., Inc.*, 671 F.2d 539, 548 (D.C. Cir. 1982).

The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3rd Cir.), *cert. denied*, 429 U.S. 966 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

In this case, Kaiser contends that it raised the issue in a colloquoy with the district court concerning jury instructions. A request for jury instructions may suffice to fulfill the requirement that a motion for a directed verdict be made before granting a JNOV only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such. *Mallick*, 644 F.2d at 234; *Lowenstein*, 536 F.2d at 11. We have studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice that after all the evidence had been presented Kaiser was raising an issue as to whether damages for diminution of going concern value could be awarded. The record shows that Kaiser

only objected to the wording of a jury instruction and agreed that the instruction on diminution of going concern value could be submitted to the jury after it was reworded. App. at 7529-31.

Finally, even if, contrary to our conclusion, we were to assume that Kaiser had properly raised the issue in its motion for a directed verdict, it was error for the district court to have ruled for the defendants on this aspect of the motion for a JNOV. The plaintiffs' theory at trial was that damages for diminution of going concern value could be awarded as of the date that Columbia had effectively gone out of business. The plaintiffs argued to the district court that Columbia had ceased manufacturing operations prior to May 31, 1977 and would have gone out of business by that date because of Kaiser's anticompetitive activities if Columbia had not received an Economic Development Administration loan from the United States Department of Commerce. The loan permitted Columbia to continue operations for a few months before it ultimately went out of business and liquidated its assets. The plaintiffs presented evidence to support their theory and the jury was instructed, without objection, as to the plaintiffs' theory.

Kaiser neither submitted contrary jury instructions, nor did it object to the jury instructions as required by Fed.R.Civ.P.51. The district court also specifically asked counsel for Kaiser whether he objected to the plaintiffs' legal basis for seeking damages for diminution of going concern value, and Kaiser's counsel raised no objection to the submission of the issue to the jury. App. at 7529-7531.[4]

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4. For example, the plaintiffs submitted a proposed jury instruction which stated, *inter alia*, "An antitrust plaintiff may recover both lost profits and the value of the business as a going concern as of the date the business terminated or made effectively dormant by the actions of defendants." App. at 5601. Kaiser's counsel, when asked by the district court if he had any objections to the instruction replied, "I don't really have an objection to the description of what

By granting Kaiser's motion for JNOV, the district court effectively repudiated its own jury instructions even though Kaiser had not challenged the legality of the plaintiffs' damages theory. Having properly submitted the issue to the jury, it was error to rule on a JNOV that the plaintiffs, as a matter of law, could not recover for diminution of going concern value on the ground that Columbia had not actually liquidated on the date used for the damages calculation.

We conclude that Kaiser failed to preserve for JNOV consideration the ground relied upon by the district court to grant the JNOV, and that the district court incorrectly decided that the jury determination was erroneous. To the extent that the district court's order granted the motion for a JNOV, it will be reversed.

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the plaintiff is seeking to do here, your Honor. It is just the way this is phrased. It is not really an objection to the concept of the charge." App. at 7531.

X. Conclusion

The order of the district court granting in part the defendant's motion for a JNOV will be reversed. The judgment entered by the district court on January 18, 1983 will be vacated and the judgment entered on December 4, 1981 will be reinstated, and that judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

Judgment of the Court of Appeals

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 83-1047 & 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M.,
and CLISBY, BARBARA K., as Transferrees
in Liquidation and Dissolution of
Columbia Metal Culvert Co., Inc.,

Appellants and Cross-Appellees

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and
KENNEDY CULVERT & SUPPLY COMPANY and
ROBERT KENNEDY

Kaiser Aluminum & Chemical Corporation and
Kaiser Aluminum & Chemical Sales, Inc.,

Appellees and Cross-Appellants

(D.C. Civil No. 74-0122)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 18, 1983, which granted in part the defendant's motion for a judgment n.o.v. be and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered January 18, 1983, be and the same is hereby vacated and the cause remanded to the said District Court which is directed to reinstate the judgment entered December 4, 1981, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court.

ATTEST

Clerk

December 27, 1984

APPENDIX D

Memorandum and Order of the District Court

June 18, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, *J.* JUNE 18, 1981

INTRODUCTION

Post-trial motions in this antitrust litigation are before the court pursuant to a limited remand order of the United States Court of Appeals for the Third Circuit. Defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") move for a judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict in

favor of Columbia Metal Culvert Co., Inc. ("Columbia")[1] finding KACC and KACSI in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and awarding damages in the sum of $1,815,000. Judgment was entered for the plaintiff in the trebled amount of $5,445,000.

Columbia originally brought suit against KACC and KACSI and former Columbia salesman Robert A. Kennedy and the company he owned, Kennedy Culvert and Supply, an independent distributor of culvert and drainage pipe manufactured by KACSI. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §15. At the jury trial held before the Hon. Edward N. Cahn, a directed verdict for all defendants was entered at the close of Columbia's case on the ground that Columbia had not made out a *prima facie* case of conspiracy in restraint of trade between KACC/KACSI and the Kennedy defendants. The district court further found that the product market was not limited to aluminum culvert pipe as Columbia had maintained but included culvert pipe whether made from either aluminum or steel. Since the Kaiser share of the aluminum and steel culvert pipe market was concededly not significant, the court held that Kaiser could not have monopoly power. The court further found that no *prima facie* violation of Section 3 of the Clayton Act had been proven. *See, Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, Civil Action No. 74-122 (July 20, 1977).

On appeal by Columbia, the Third Circuit reversed in part and affirmed in part. The Court affirmed the grant of a directed verdict in favor of the Kennedy defendants

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1. Upon liquidation of Columbia, all of its claims, rights and interest in this litigation were assigned to its shareholders, Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby; the current named plaintiffs were substituted as parties pursuant to Fed.R.Civ.P. 25(c) by the court's Order of May 30, 1980.

on the issue of conspiracy. The Court also upheld the district court's finding that no *prima facie* case of a Clayton Act violation had been proven. However, the grant of a directed verdict in favor of defendants KACC and KACSI was reversed. The Court held that:

> (1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert only rather than culvert of either aluminum or steel;
>
> (2) There was sufficient evidence to go to the jury on the charge that KACSI and KACC violated §2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market; and
>
> (3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 37 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

A bifurcated trial before this court resulted in a determination of defendants' liability in answer to special interrogatories (attached to this opinion as Appendix A); the jury found that the relevant product market was for aluminum culvert pipe, that defendants KACC and KACSI had monopolized, attempted to monopolize, and conspired to monopolize this market in violation of Section 2 of the Sherman Act; that KACC and KACSI had conspired in violation of Section 1 of the Sherman Act; and that Columbia had been injured by the unlawful acts of KACC and KACSI.

The jury then awarded damages in the amount of $1,048,000 for lost profits, $710,000 for the destruction of Columbia as a going concern, and $57,000 for the cost

of extra metal (relating to Columbia's spiral machine for making pipe), a total of $1,815,000, which trebled resulted in a judgment of $5,445,000. Following a second appeal, the case was remanded to the district court for disposition of post-trial motions.[2] (Docket Entry #426). Columbia having won a jury verdict at trial, we consider the following facts in the light most favorable to plaintiff.

Columbia was a company specializing in the manufacture and marketing of aluminum culvert pipe with a plant in Vineland, New Jersey. KACC manufactures aluminum sheet and coil from which aluminum culvert pipe is constructed and conveys these materials to its wholly-owned subsidiary KACSI, which in turn sells the sheet and coil to pipe manufacturers such as Columbia. KACSI also fabricates and sells aluminum culvert pipe itself in competition with the fabricators to whom it supplies sheet and coil.

These three entities had a successful business relationship for many years during which Kaiser was Columbia's main material supplier. Beginning in 1971, a four-pronged effort took place to put Columbia out of business in retaliation for Columbia's placing of aluminum orders with Reynolds Aluminum. This KACC/KACSI effort included a refusal to sell to Columbia, a decision to locate a new culvert manufacturing plant within fifty miles of Columbia's plant, setting up Robert A. Kennedy, Columbia's best salesman, in business as an independent distributor of KACSI products, and a "price squeeze" by KACC and KACSI, accomplished by transferring sheet and coil from KACC to KACSI below cost. This allowed KACSI to make a profit on sales of pipe at prices which Columbia could not match; the price of aluminum was increasing and the supply of the metal was severally limited.

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2. A direct appeal was taken because defendants failed to file post-trial motions timely. The Court of Appeals, upon defendants' motion, allowed a limited remand to this court to have the benefit of the trial judge's views upon the issues in contention.

The Kaiser defendants move this court for a judgment notwithstanding the verdict, on the ground that Columbia produced insufficient evidence to support the verdict in several material respects. In the alternative, defendants move for a new trial on the ground that the verdict was contrary to law, against the weight of the evidence, and that the court erred in certain evidentiary rulings, in jury instructions, and in submission of certain interrogatories to the jury.

In ruling on a motion for judgment N.O.V., "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for him." 6A *Moore's Federal Practice* §59.08[5] at pg. 59-152 (1979). On the other hand, a motion for new trial, on the ground that the verdict was against the weight of the evidence, is addressed to the sound discretion of the trial court. *Id.*

POST-TRIAL MOTIONS — LIABILITY

Defendants' contentions must fail in view of the Circuit Court's opinion in *Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corporation*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) and the doctrine of the law of the case.

As noted in *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976):

> This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, *unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal*, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless the decision is clearly erroneous and works

> manifest injustice. (emphasis supplied, citations omitted).

See, e.g., United States v. American Bag & Paper Corp., 609 F.2d 1066, 1067, n.3 (3d Cir. 1979) (determination by panel of Court of Appeals was law of the case and later panel was bound by it); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 482 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979) (Court of Appeals' prior opinions were law governing the case with respect to question of whether it was permissible to remand plaintiff's due process claims to district court and district court's observations on remand were of no effect); *Chlystek v. Kane*, 540 F.2d 171, 173 (3d Cir. 1976) (Court of Appeals governed by law of the case from prior appeal with respect to whether a substantial federal question was present); *Spock v. David*, 502 F.2d 953, 955 (3d Cir. 1974), *reversed on other grounds*, 424 U.S. 828 (1976) (on essentially the same record as was before the Court of Appeals prior to remand, both the district court on remand and the panel of the Court of Appeals on appeal following remand were bound, with respect to issue decided by the Court of Appeals prior to remand, by decision on that issue as the law of the case); *A.M. Webb & Co. v. Robert P. Miller Co.*, 176 F.2d 678, 680-81 (3d Cir. 1946) (on trial after remand of case, questions settled by Court of Appeals could not be relitigated); *Moyer v. Aetna Life Insurance Co.*, 126 F.2d 141, 143 (3d Cir. 1942) (law of case on prior appeal as to sufficiency of the evidence on certain points precluded reconsideration thereof upon defendant's appeal of district court denial of judgment N.O.V. after second trial).

This court is bound by the Third Circuit's decision on issues presented and decided explicitly or implicitly in the prior appeal. *See, Todd and Company, Inc. v. SEC*, 637 F.2d 154 (3d Cir. 1980). For this reason we reject Kaiser's initial contention in its brief in support of post-trial motions, that because KACSI is "wholly owned and

controlled" by KACC (Defendant's Brief in Support of Motions at 2), the two corporate entities are incapable of a conspiracy for lack of the requisite plurality of actors. The Third Circuit explicitly rejected this argument as "not well-founded in law," and reaffirmed the viability of the "intra-enterprise conspiracy theory" as applied to separate corporate entities. *Columbia Metal, supra* at 33. *See, Cromar Company v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976) (absence of the appearance of competition between parent corporation and wholly-owned subsidiary not a bar to Section 1 Sherman Act liability.) This court may not reconsider that determination.

A similar fate befalls Kaiser's contention that there was insufficient evidence to support a finding of an unlawful conspiracy between KACC and KACSI, insufficient evidence to support a finding that KACC or KACSI had a specific intent to monopolize or to wilfully maintain monopoly power, insufficient evidence to support a finding that the relevant product market was aluminum culvert and drainage pipe alone, and insufficient evidence to support the court's charge on the price squeeze issue. The Third Circuit explicitly found the evidence sufficient to allow a jury to find for Columbia on each of these points. *Columbia, supra* at 37.

The law of the case doctrine precludes a reconsideration of that determination unless the evidence at the second trial was *substantially* different from that considered by the appellate court. *Otten, supra.* However, the evidence which the Court of Appeals found sufficient as to each of these points was substantially repeated in the second trial.

Product Market

The evidence persuasive to the Third Circuit on the product market issue, *Columbia, supra* at 29-31, essentially repeated itself at the second trial. For example,

there again was testimony that aluminum is a specialty material[3] and that there are specialized vendors of aluminum products.[4] Several witnesses testified that the physical properties of the three types of manufactured culvert pipe, steel, concrete and aluminum, differ significantly.[5] Because of these differences, evidence at the second trial again showed that specifications for construction projects require one type of culvert rather than another.[6] From this evidence a jury might infer that distinct markets exist for aluminum, steel and concrete pipe, at least from the contractor's point of view. *See, Columbia, supra,* at 28.

The record here shows, as did the record before the Court of Appeals, that a jury would not act unreasonably in finding that, "patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market." *Columbia, supra* at 28. Again, there is testimony that price was not a crucial factor in these engineering decisions[7] and that the three culvert products are neither interchangeable nor in competition from an engineering standpoint.[8]

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3. *E.g.*, N.T. 248 (Bonjorno) (". . . aluminum was always a specialty product. It was during the sixties, and it was during the early seventies, and it was at the period and point in time that we're talking about . . . ."); N.T. 681 (Arvay) (". . . aluminum again becomes a very highly specialized product . . . ."); *See*, Plaintiff's Brief in Opposition to Defendants' Motions at 9.

4. *E.g.*, N.T. 2848 (specialized in aluminum "as far as a storm drainage product . . . ."); N.T. 17 (Bonjorno).

5. *E.g.*, N.T. 874, 879, 882-883, 885-886, 888-889, 893-894 (Elam). *See*, Plaintiff's Brief in Opposition to Defendants' Motions at 9.

6. *E.g.*, N.T. 904, 915, 916 (Elam); N.T. 1698 (Price).

7. *E.g.*, N.T. 919 (Elam) (". . . you are going to specify that product in most instances where price is not even a factor . . ."); N.T. 680 (Arvay) (". . . as far as the price situation is concerned, that is not the concern to them . . . ."); N.T. 1701 (Price); *See*, Plaintiff's Brief in Opposition to Defendants' Motions at p. 8.

8. *E.g.*, N.T. 1408 (Chafin) (". . . it [aluminum] has inherent characteristics which are different from the other materials . . .");

Defendants also argue that steel and aluminum culvert may share the same production facilities as an indicia of products in the same market for Sherman Act purposes. The fact that the same production facilities can be used to turn out steel and aluminum culvert and even the fact that companies often manufacture both products is insufficient to preclude the existence of separate markets as a matter of law; *Columbia, supra*, at 29 n.30.

Defendants vigorously assert that the evidence does not support the jury's finding of an aluminum culvert product market. (*See*, Defendants' Brief in Support of Motions at pp. 99-109). Defendants point to extensive testimony, particularly that of defendants' expert, Dr. Epstein, supportive of their view. But the jury rejected defendants' testimony on these points and accepted that of the plaintiff; the Court of Appeals has already determined that plaintiff's evidence would reasonably support such a jury finding.

Thus this court accepts the jury finding of an aluminum culvert pipe product market, as sufficiently supported by the evidence.

Unlawful Conspiracy Between KACC and KACSI

The evidence found sufficient to prove unlawful conspiracy between the defendants, *Columbia, supra* at 34-35, was also placed before the jury in the second trial. Again there was evidence that KACC and KACSI combined to impose a price squeeze. For example, there was evidence from which the jury could infer that Collins of

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N.T. 918 (Elam):

> "Q. Now taking your professional group, the Drainage Engineers and engineers who design drainage systems and design culvert and specify different commodities of culvert, in your opinion, does that group view these products, steel, aluminum and concrete as interchangeable?"
>
> "A. No, I don't think they do."

KACSI had no part in setting the specification price of coil, which was a KACC price (N.T. 171, 1972, 1957), that Collins was chastised by KACC for not getting prices up high enough (P-950, N.T. 2277, 2281, 2560), that Collins reported to the Sheet and Plate Division of KACC (N.T. 2307, 1718-20), that someone higher than Collins was responsible for the price increase crucial to this litigation (N.T. 1972), that KACC transferred coil to KACSI below cost (N.T. 1964, P-823) and that Collins' request for a plant in New Castle, Delaware was approved by KACC (N.T. 1792, 2114, 2317, 2372, 1976, P-204, 210). *See*, Plaintiff's Brief in Opposition to Defendants' Motions at pp. 12-13. From this and other information adduced at trial, the jury might again infer that "the pricing policies of KACSI were not independent . . . but rather arrived at jointly with KACC." *Columbia*, 579 F.2d at 35. Although there was evidence from which a contrary finding might have been made (*see*, defendants' Brief in Support of Motions at pp. 32-59), we find the evidence was sufficient to support the jury's conclusion that KACC and its wholly-owned subsidiary, KACSI, conspired in violation of the Sherman Act.

Intent to Monopolize

Defendants argue that plaintiff's evidence was insufficient to support the jury's finding that the Kaiser defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act (*see*, Defendants' Brief in Support of Motions at pp. 60-99). Judge Cahn's directed verdict for defendants on this issue at the first trial resulted from his related finding that steel and aluminum, rather than aluminum culvert pipe alone, must constitute the relevant product market. The Third Circuit, as discussed above, found that it was not unreasonable to conclude that culvert pipe alone constituted a relevant market, and therefore that "the foundation of the directed verdict on the §2 count collapses." *Colum-*

bia, 579 F.2d at 31. The Court of Appeals also stated that there was sufficient evidence to infer that KACSI, an entity controlling 80% of the market, attempted to drive Columbia out of business. *Columbia*, 579 F.2d at 31. That same evidence persuasive to the Court of Appeals was presented to the jury at the second trial. Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia (N.T. 1533, 1540-1541, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia*, *supra* at 31), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-2318, 2840). Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T 1734, 2544-2545), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kennedy, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-1863, 2525-2529, 2842-2849, 2854, 2997, Exhibits P-75, P-24, P-5). The Arvay testimony, specifically noted by the Third Circuit, *Columbia*, *supra* at 31, n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 1261, 1809, 1810, 1814, 2509, Exhibit P-201). Therefore, the evidence was sufficient to support

the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act.

In summary, on the liability issues, the evidence on retrial was not substantially different from that considered by the appellate court and must be deemed sufficient to support the jury's finding in favor of the plaintiff. Moreover, not only was the evidence sufficient, the court in the exercise of its discretion does not find the jury's determination so against the weight of the evidence as to shock the conscience of the court. Therefore, a new trial would be denied on all issues of liability. The court has carefully considered all other grounds raised by defendants in their motion for judgment notwithstanding the verdict and, with the exception of ground eleven (11) relating to damages and discussed *infra*, determines them to be without merit.

DAMAGES

The trial of this matter having been bifurcated, after the jury verdict on liability against defendants, two days of testimony on damages followed; the jury, again upon answers to special interrogatories (attached hereto as Appendix B), then found damages in favor of plaintiff in these amounts: 1) $57,000 for increased costs of metal; 2) $1,048,000 for lost profits; and 3) $710,000 for the reduction in the value of Columbia as a going concern. The total damage award by the jury was $1,815,000. The jury's award was trebled in accordance with the remedy provided in Section Four of the Clayton Act, 15 U.S.C. §15; the final judgment in plaintiff's favor is in the amount of $5,445,000.

Defendants raise numerous objections as to the award of damages.

Causation

Defendants argue that plaintiff did not establish the requisite causal link, under Section Four of the Clayton Act, between the financial damage suffered by Columbia and the defendants' violation of the antitrust laws. Defendants assert that they are entitled to judgment in their favor if the damages to the plaintiff were caused in whole or in part by factors other than defendants' violations of the antitrust laws.[9] Defendants assert that Joseph Bonjorno, Columbia's chief witness and shareholder, on cross-examination identified several reasons, other than defendants' activities, for losses suffered by Columbia during the relevant time period. Among those causes cited by defendants are: the recession in the construction industry,[10] a nationwide aluminum shortage,[11] the inability of Columbia to obtain price protection from suppliers,[12] and the unstable financial condition of Columbia's chief financial backer, George Kerr.[13]

Damages attributable to an antitrust violation are recoverable even when factors other than defendant's wrongful acts alone may have contributed to the plaintiff's injury. 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] (1978). In this case there was sufficient evidence, if accepted by the jury, to show that Columbia's business decline was caused by Kaiser's illegal activity. Mr. Bonjorno stated repeatedly, both on direct and on cross-examination, that the injury to Columbia was caused by Kaiser's illegal activity.[14] He also stated that in projecting damage figures he had considered the legal competition of others in the marketplace. (N.T. 3971). He further stated that the damage projec-

9. *See*, Defendants' Brief in Support of Motions for Judgment N.O.V. or for a New Trial at p. 11 (citing cases).

10. *See*, N.T. 3903-3905.

11. *See*, N.T. 3908-3909.

12. *See*, N.T. 3911-3918.

13. *See*, N.T. 3919-3920.

14. *E.g.*, N.T. 3864, 3865, 3902, 3904.

tions did not go beyond a point where it was simply too difficult to determine "who was responsible for what" (N.T. 3858). When cross-examined as to other possible causal factors in Columbia's decline, Bonjorno either asserted that these factors were not significant or that Kaiser's illegal activity had made Columbia particularly vulnerable to troubles that, absent such wrongdoing, would not have created financial problems.[15] The jury had before it, through this adept cross-examination, those other factors. However, the jury found that Kaiser's illegal activity caused the financial harm suffered by Columbia. Damages for injury by antitrust violations may be implied even though other factors may have contributed to the injury. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946); *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962). Here, plaintiff did show, with the requisite reasonable certainty, an injury in consequence of Kaiser's conduct. *See, Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976). Judgment notwithstanding the verdict on causation would be improper.

Duplication in Damages Award

Defendants assert that, when the jury returned a verdict of $1,048,000 for loss of profits during 1974-1977 and $710,000 for the reduction in the value of plaintiff's business as a going concern as of May 1, 1977, Columbia was awarded a double recovery for the same loss. Defendants' theory for this duplication argument is not clear but seems to include these contentions. Defendants first argue that plaintiff's recovery of lost profits in this action together with the amount received from the sale of Columbia's assets to Howmet in 1977 for $574,000 fully compensated plaintiff for its losses because the value of Columbia as a going concern was the

15. *E.g.*, N.T. 3907, 3908, 3910, 3912, 3913.

amount received from Howmet at the time of sale. Receiving damages for business as a going concern under this theory duplicates the money paid Columbia by Howmet in 1977 *not* the lost profits awarded by the jury at trial. A part of this argument is that either Howmet paid for Columbia's total going concern value as of May, 1977 (including goodwill) or that Howmet bought only Columbia's assets; *i.e.*, all Columbia had left at that time, as Columbia itself asserts. If the latter is the case, Kaiser argues that projected lost future profits should not add to a going concern value since Columbia, defunct as of 1977, could have no future profits.

Defendants next contend that the method of calculating the damage to Columbia as a going concern caused a duplication between the two theories of damage recovery. Defendants state that the same figures used to calculate past lost profits, were used to project Columbia's profits into the future, post 1977, to arrive at a going concern value. (A going concern value indirectly reflects future profits as "[t]he current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings." *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, 1023 (D.N.J. 1976), *reversed on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) *rehearing denied*, 438 U.S. 908 (1978).) This, defendants maintain, created an impermissible duplication since the same figures establish both damage theories.[16] Finally, defendants argue that a recovery for going concern value and lost profits is generally not allowed.

We will deal with the last contention first. As noted in 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[1] (1978), "there are three types of damages that a successful antitrust plaintiff may recover under Section 4: (1) increased costs; (2) lost past net profits; and (3) reduction in the value of the business. *Absent*

16. *See*, Defendant's reply brief at p. 51.

unique circumstances, these three types are not duplicative of each other." (emphasis supplied). Numerous cases support this general proposition. *See, Story Parchment Co. v. Patterson Parchment Paper Company*, 282 U.S. 555, 561 (1931) ("[t]he trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents' and (2) the extent to which the value of the petitioner's property had been diminished as the result of such acts."); *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, *supra*, (involved damages for both lost profits and going concern value); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) ("[t]he district court ruled that ABP was entitled to compensation for two categories of injuries — lost profits on sales that were prevented prior to the termination of its Sony dealership, and the reduction in the value of ABP's business resulting from the termination"); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (lost profits and goodwill loss, determined in part by reference to potential for future profits); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) (sufficient compensation included damages in amount of profits lost prior to the forced sale of the business *plus* its full market value, absent the illegal practices). Thus in this case, absent some unique circumstance, it is clear that plaintiff is entitled to both the lost past profits as of the time of the sale to Howmet and the value of the business, as it would have been absent defendants' violation of law, in May of 1977 upon Columbia's termination.

Defendants claim that the method of calculating going concern value created duplication in the damages award since going concern value was calculated, in part, by using the past lost profit figures in order to project potential future profits. Defendants assert that this method allowed plaintiff to recover its lost profits twice.

However, several cases, discussing damages calculations in the antitrust area, have explicitly or implicitly endorsed this method of determining going concern value. For example, in *Eiberger, supra*, at pp. 1081-1082, n.25, the court stated:

> 25. Although it is unclear, Sonam may also be arguing that the district court erred when it included in the one-year base period figures an amount for profits that ABP would have earned on sales lost as a result of Sonam's intimidation. Such an argument is clearly incorrect. ABP is entitled to an award that covers all of the profits it would have earned but for Sonam's violation: these include both the profits lost while ABP was still an authorized dealer, and the profits it would have earned after that point, which when capitalized equal 'going concern' value of the lost portion of ABP's business. *See, Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 80-82 (1st Cir. 1970). *To exclude lost profits from the base period figures used to project the latter component would be to reduce plaintiff's award for the later period precisely because defendant's intimidation had been successful in the base period. Such a reduction would obviously be improper.* (emphasis supplied).

Similarly, in this case, it was appropriate that the calculation of Columbia's value as a going concern included as its base figure, not the past profits depressed by defendants' violations, but the past profit history as it would have been but for the violation.

Of similar import is *Copper Liquor, Inc. v. Adolph Coors Co., supra* at 579 n.9, where the court described the calculation of a retail liquor store's goodwill value, in

a case where plaintiff sought both lost profits and good will:[17]

> 9. Relying on the assumption that the store reduced its markup from 25 percent to 15 percent in 1966, Green calculated the store's goodwill value by adding the lost gross profits for each year of the store's operation to the net profits for the store as they appeared on the store's corporate income tax returns. The sum of lost gross profits and net profits for the four years, 1967 to 1971, was identified as adjusted net income. Adjusted net income, in the amount of $100,046, was divided by the number of years to obtain average net income. Mr. Green then subtracted from average net income the store's return on capital computed at 6 percent per year to derive average net income after return on investments. This figure, $21,980, was multiplied by five to arrive at a goodwill value of $109,899.

Again past lost profits were taken into account in the figure from which goodwill was projected. Finally, by way of example, the district court in *Glauser, supra* at 1023 n.14, made the following observations on this point:

> 14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years *and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct*. (emphasis supplied).

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17. "Valuing a business's goodwill, of course, is a subjective determination that takes into consideration factors such as a business's age, profit history, customers, and *potential for future earnings*." (emphasis supplied). Copper Liquor Co., *supra*, at 579 n.8.

In the instant situation, then, we find no merit to defendant's contention that the method of computation used in this case created a duplication.[18] Rather, by adding Columbia's estimated profit figures in those prior years and then projecting forward for future profits, Columbia quite appropriately measured its value as a going concern from its estimated 1977 condition had there been no prior damage caused by defendants. Necessarily, this method creates a projection based upon a projection but it is defendants' prior misdeeds that make such a formulation necessary.

Finally, we consider defendants' contention that Columbia's recovery for going concern value duplicated the amount received in 1977 when Columbia transacted its sale to Howmet. Plaintiff asserts that the transaction with Howmet was a sale of assets only, since Columbia, having been destroyed as a business by Kaiser, had no good will value left. Both Bonjorno [19] and Dr. Kuehn so

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18. Defendants' cited cases can be read to support plaintiff's position. Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974), involved a finding of double recovery under the Automobile Dealer's Act where the damages for lost future profits did not reflect the fact that plaintiff had sold certain assets for $60,000. Defendants cite it for that proposition. However, the court in Rea, at 587 n.19, stated that "neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash . . ." Clearly the Howmet purchase price was taken into account in this case; defendants' in their Reply Brief at p. 51 note Dr. Kuehn's assumptions regarding the Howmet sale in the going concern value computation. Also, in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969), *supp. order*, 421 F.2d 91 (1st Cir. 1979), cited by defendants, the court allowed plaintiff to recover both its lost profits to the date it went out of business and the going concern value of the plaintiff on that date.

19. N.T. 3864 (Bonjorno):

> "A. Well, we — as long as we were operating we had our good name. We had our reputation and our ability to manufacture a high quality product, our ability to work and get our product specified. This as all part of Columbia Metal and its good

testified.[20] If this is the case, Kaiser argues that there was no reasonable prospect that Columbia would have earned profits in the future. However, Columbia's value as a going concern, that is its market value to Howmet, would certainly have been greater if its goodwill, and thus its potential for future profit, were intact.[21] If Howmet paid only for tangible assets, Columbia did not receive the worth of its business absent the violation which destroyed its goodwill. If Columbia indeed had no reasonable prospect of future profits, that indicates more damage to Columbia, not less damage to its going concern value.

As an alternative characterization, defendants assert that whatever intangible value Columbia had, assuming it had some, was paid for by its 1977 purchase by Howmet. It was plaintiff's express assumption that

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NOTES *(Continued)*

name in the aluminum culvert pipe industry in the trading area, and they effectively destroyed this.

Q. Who is they?

A. Kaiser Aluminum."

20. N.T. 4041 (Kuehn):

"Q. Well, do you make an assumption as to what the actual value was as a going concern on May 31, 1977?

A. Yes.

Q. What is that?

A. Well, the assumption is that the value of the firm on that date was limited to physical assets, and consequently that there was no operating value beyond the sheer value of the assets that existed.

Q. And based on what you know about this case, is that a reasonable assumption?

A. Given that — given the actual operation of the firm in the previous years in the damaged state, I would say yes."

21. *See,* Copper Liquor, Inc., *supra,* at 579 n.8:

"According to Cook's expert, Wayne Peters, goodwill is the amount that a purchaser would be willing to pay for a business *over and above the value of the business's tangible assets.* Valuing a business's goodwill, of course, is a subjective determination that takes into account factors such as *potential for future profit.*" (emphasis supplied).

Howmet bought only tangible assets (N.T. 4041) and that its projection of ". . . the value of the business was computed in terms of whether the rates of return from the operation of this business in the absence of damage produced or would have produced a return in excess of the profits that might be expected from the tangible assets alone. In other words, was there additional profit that would then be attributed to intangibles which would indicate some value of good will relative to the operation of the business." (N.T. 4039-4040). *Compare, Pitchford v. PEPI, Inc.*, 531 F.2d 91 (3d Cir. 1975) (failure to deduct Mr. Pitchford's salary as a cost of operation from data used to project potential earnings for the purpose of evaluating the lost going concern value of Pitchford created a double recovery).

On cross-examination, Dr. Kuehn, confronted with the purchase agreement between Howmet and Columbia, which allocated $16,000 of the purchase price for intangibles,[22] stated that amount should be subtracted from certain of his estimates, since his projections assumed the Howmet sale involved assets only.[23] Whatever amount was actually received for intangibles must be subtracted from the estimates to avoid an award of damages for an amount that is duplicative in the sense that it has already been recovered.

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22. Corporate name and covenant not to compete.

23. N.T. 4149 (Kuehn):

> "According to the figure I just saw, the purchase price of the tangible assets apparently would be $564,000 and consequently, if I understand it correctly, $16,000 should probably be subtracted from the various estimates presented here on the bottom lines for both the capitalization at 15% and the capitalization at 20%."

However, Dr. Kuehn also indicated that the two items on the intangibles line of the purchase agreement actually had no worth. *See*, N.T. 4146 (corporate name); N.T. 4147 (covenant not to compete). (For the other inadequacies of Dr. Kuehn's testimony, see N.T. 4018-4019, 4050-4051, 4089, 4092-4093, 4108-4109, 4111.)

Increase in Metal Costs

Plaintiff claimed damages for lost profits for the years 1974, 1975 and 1976 but in addition made a specific claim for extra costs attributable to an increase in the amount of aluminum coil used in 1971, 1972 and 1973; plaintiff contended this increase in metal cost was caused by the misrepresentations of defendants concerning the gauge of aluminum Kaiser would continue to use. The Stamco machine plaintiff installed in the spring of 1970 utilized a 2-inch gauge because Kaiser used that gauge; the rest of the industry used a 2⅔-inch gauge. Kaiser, which had used 2 inch, then converted to 2⅔-inches; plaintiff contends that Kaiser concealed its intention to do this to put plaintiff at a competitive disadvantage. This had been presented to the jury during the trial on liability, not as an antitrust violation in itself but as a part of a pattern of conduct from which retaliatory conduct could be inferred. Plaintiff admitted it could not isolate damages for other aspects of its proof on retaliatory conduct but urged that a finding of specific damages for extra use of coil was appropriate. Because plaintiff stated to the jury that damages would be claimed only for 1974, 1975 and 1976, the court was in error in allowing the extra cost of metal for prior years to go to the jury as a separate item of damages; that plaintiff was able to isolate it as a matter of proof (N.T. 3981-3995) is not a sufficient reason to allow it as an item of damages in the context of the trial as a whole. Therefore, the award of $57,000 ($171,000 trebled) is set aside and the defendants' motion for judgment notwithstanding the verdict is granted as to that amount.

Sufficiency of the Evidence as to Amount of Damages

We recognize that once the fact of injury has been proven, the burden on the antitrust plaintiff to establish the "precise amount of damages is not as great as in other kinds of lawsuits." 15 ANTITRUST LAWS AND

TRADE REGULATION §115.01[2] at 115-5 (1978). *See, J. Truett Payne Co. Inc. v. Chrysler Motors Corporation*, 49 U.S.L.W. 4516 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (less rigid standard of proof with respect to amount of damages caused by an antitrust violation); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973) ("[i]n an anti-trust case the burden on the plaintiff to prove the amount of damages is less severe than the burden to prove the fact of injury . . . ."); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 796 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), *rehearing denied*, 404 U.S. 877 (1971) ("The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections . . . "). However, a plaintiff must offer proof as to the extent of injury, showing that the damage involved is measurable in dollars. *See, Deaktor v. Fox Grocery Company*, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). Further courts have stated repeatedly that the measure of damages may not be based upon mere guesswork, speculation, or conjecture. *E.g., Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra; Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

Although plaintiff did show economic injury in consequence of defendants' conduct, the evidence presented by Columbia as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only. The evidence presented by Columbia's two damages witnesses, Bonjorno and plaintiff's expert witness on damages, Dr. Alfred Kuehn, was incomplete, confusing and generally lacking in probative value. The factual basis of the projections, predic-

tions and calculations presented by them was never clear from the testimony.

Plaintiff estimated damages sustained in lost profits and in the decline in value of the business as a going concern by using four projection Methods (Methods C, D, E, and F). Method C (P-3012), projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing.

The testimony of an antitrust plaintiff who is an owner or officer of the damaged business may be sufficient to support a jury verdict on damages where the owner is qualified by experience and position to make damages estimates. *See, generally, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969) (Zenith's officers, experienced businessmen, testified that repressive effects on Zenith were due to patent pool; no basis in record for refusing to accept testimony of the two officers as probative evidence); *Greyhound Computer v. International Business Machines*, 559 F.2d 488, 507 n.41 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (most of the damages testimony came from Greyhound's president; where the record reflects his competency and the factual basis for his conclusion, an interested witness may testify as to the amount of damage and it is for the jury to determine the weight to be accorded his testimony); *Kestenaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (wholesale distributor's estimation of good will value of his business admissible in antitrust suit as an owner is competent to give his opinion on the value of his property; weight and

credibility given owner's testimony is generally for the jury); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) ("We do not hold or imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions. . . .").

But an inexperienced owner using purely speculative bases for his estimations of damage may provide testimony of such minimal probative force as to warrant a judge's refusal to submit the issue to the jury. *See, Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961, *cert. denied*, 369 U.S. 839 (1962). It follows that such testimony would justify the grant of a new trial in the exercise of the court's discretion.

We do not find that Mr. Bonjorno was an inexperienced owner who was not qualified to make damage estimates. Bonjorno started Columbia in 1959 and performed proprietary, managerial and sales functions from Columbia's beginning until its assets were sold in 1977. However, we do find the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy.

For example, Bonjorno estimated Columbia's return on sales at 17.6% for 1974, 12% for 1976 and 8% for 1977, all significantly higher than that of any previous year of Columbia's operation; the previous high was only 5.8%. Bonjorno's explanation for this increase demonstrates the minimal evidence upon which this five million dollar verdict rests:

N.T. pp. 3959-3960:

"Q. What was the reason why you projected so much greater profitability in 1974 than you had experienced in your entire history?

A. A number of reasons, Mr. McElroy.

Number one, we would have had a much lower metal cost due to the new configuration. The fact that we were making standard corrugated pipe meant that the material costs would be down by approximately 4 to 5%.

Q. All right.

A. We now were in a position to offer perforated pipe made on our own perforating mill, which would have been a highly profitable product, also, and would have given us an access to other markets.

It would have also given us a much higher percentage of profit in those areas that were remote to southern New Jersey, because the prices were better in areas away from southern New Jersey than they were in the southern New Jersey area, so that we felt we would have a substantially greater margin of profit on the sales that we projected.

Q. So that you would have increased your profitability from 2.6% to 17.6% in one year? That's an increase of 15%.

A. I thought that was reasonable."

N.T. pp. 3958-3959

"Q. You've projected, in 1974, $1,805,569 in sales and you have an income of $318,683.

Do you know what that percentage is?

A. It looks like its around 15%. I'm not sure without calculating it.

Q. It is 17.6%. 17.6%.

Now, on Exhibit 3062 is there any year in which return on sales exceeded 10%?

A. No, there is not.

Q. Is there any year in which it exceeded 5%?

A. No, there is not.

Q. Isn't there one? 1971?

A. 5.8. I'm sorry.

Q. 5.8% and that was the best year, 5.8%?

A. Yes.

Q. And yet, you projected an income of 17.6% here?

A. Yes."

Also troubling was Bonjorño's estimate as to the pounds of metal sold in 1973 by Columbia, a critical figure since 1973 was the base year selected by the plaintiff as his starting point for all other damage calculations and projections. Although Bonjorno did state a figure before the jury (N.T. 3932: "[a]pproximately, I think they are about 2.3 or 2.4 million pounds, approximately."), the basis in fact or source of the figure was never explained. (N.T. 3932-3942). For example, at N.T. 3933,

"Q. And did you make a compilation for this trial so you could present it to the Court and jury of what the number of pounds were of metal that Columbia sold in 1973?

A. No.

Q. Didn't counsel or anybody — wasn't anybody assigned to go through the records to find out exactly what the total number of pounds was?

A. It's possible, but I didn't do it.

Q. And you are unaware of anybody else doing it?

A. It's possible that counsel may have done it. I am sorry, maybe I misunderstood your question.

Q. My question was, do you know whether anybody did it or not?

A. I don't know specifically.

That the jury was unpersuaded by the Bonjorno testimony is plain from its damage verdict on lost profits which virtually cuts the Bonjorno estimate in half. The Bonjorno testimony of his hopes and aspirations fails to provide evidence of facts from which the jury's calculation may be logically and legally inferred.

There are similar problems regarding the damages testimony of the expert, Dr. Kuehn. Again, the problem of the pound figure for 1973 without a source appears.

"Q. Why did you convert it back to pounds?

A. Only to provide a base number for the subsequent calculation of other ratios.

Q. But the number of pounds doesn't represent what Columbia actually sold in 1973, does it?

A. I —

Q. That you calculated.

A. Since I am not sure that anyone knows precisely what the pounds are, it probably doesn't represent accurately, but it's the calculation that was obtained this way and which Mr. Bonjorno considered a fairly accurate estimate of what the actual figure was during that period.

Q. Did you review any of Columbia's books and records to determine whether or not your estimate of the number of pounds sold by Columbia for fiscal year ending May 1, 1973, was accurate or not?

A. I reviewed some records, but to the best of my knowledge — I am not sure whether one can determine precisely whether it's accurate or not. *I certainly didn't establish that it's accurate.*" (N.T. 4092-4093) (emphasis supplied).

The confusion with regard to that particular figure was merely symptomatic of the general confusion and ill-preparedness of the witness, which was admitted by plaintiff's attorney in his closing argument to the jury:

> Dr. Kuehn I think was poorly prepared to defend that basic computation that he gave you. It took him too long and he should have been better prepared. (N.T. 4197).

While recognizing the importance of expert testimony in antitrust proof of damages, 16 A.L.R. Fed. 14, 22 (1973),[24] and the fact that Dr. Kuehn qualified as one competent to offer an opinion in such matters, we determine that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case. *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ("The leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take.").

Of the methods for calculating plaintiff's damages, we have already considered Method F that relied upon the estimates of Joseph Bonjorno. Method C, that projected Columbia's sales based upon government figures on new housing starts and new highway construction, was completely repudiated by the testimony of plaintiff's

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24. "Measure and Elements of Damages Under 15 USCS §15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages."

expert. Dr. Kuehn could not explain the relevance, if any existed, of these figures to Columbia's business or to its losses:

"Q. And the Federal Government publishes statistics on new highway construction?

A. Data are published on both, yes.

Q. On both what?

A. Highway construction and housing.

Q. Now, the highway construction, that's new highways, isn't it?

A. That's correct.

Q. That does not include reconstruction, maintenance or repair, does it?

A. That's correct.

Q. And the housing starts are new housing starts?

A. It's based on new housing, yes.

Q. That would not include reconstruction or repair of existing storm sewers, for example?

A. That's correct.

Q. Now, do you know what percentage of Columbia's business was in new highway construction?

A. *I believe very little.*

Q. Most of it was, in fact, in reconstruction and maintenance, wasn't it?

A. That's my understanding.

Q. Do you know whether there is any relationship between new highways and the use of culverts?

A. Well, new highways and aluminum culvert?

Q. Any culvert?

A. *I would assume there is some.*

Q. You assumed it?

A. *Yes, because at least most highways I see, you know, there tends to be some culverts.*

Q. And that's what you based your estimation of damages on, your assumptions, that when you go along the highway you see some culverts along the road?

A. I used this method as the first of four methods since certain data were here I certainly didn't think it was perfect.

I thought it might be related, but that is precisely why in my explanation of which of the various methods I preferred *I listed this as probably the poorest of the four methods.*

I don't consider this necessarily a very good index." (N.T. 4050-4051) (emphasis supplied).

The remaining two methods, utilizing Kaiser nationwide sales (Method D) and Kaiser New Castle sales (Method E), were never adequately explained to the jury. (N.T. 4018-4019).

Although the "yardstick" measure of an antitrust claimant's lost profits, under which the claimant recovers the difference between his net profits during the damage period and the net profits earned in a comparable business unaffected by antitrust violations, is a valid method of estimating damages, 16 A.L.R. Fed. 14, 45 (1973), in this instance the evidence presented was insufficient to establish that the entities used were truly comparable or that the estimates were adjusted to reflect the differences between the businesses compared. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251

(1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, *affirmed*, 164 F.2d 1021 (3d Cir. 1946).

Lapses of this nature are frequent in Dr. Kuehn's testimony. Kuehn never could explain how the comparisons in Methods D and E were made in view of the fact that Columbia operated on a fiscal year and Kaiser operated on a calendar year. (N.T. 4057-4068). Kuehn maintained that the calendar year/fiscal year problem would make little difference, however he admitted that he had never calculated it to so determine. (N.T. 4089). Kuehn relied upon the 17.5% normal mark-up of former Columbia salesman, Robert Kennedy, in order to calculate Kaiser's average selling price per pound; however, this figure was not of record in the testimony on damages or liability. Kuehn had difficulty explaining why his calculation of damages for cost of goods sold included a variable cost equal to 11.17% of sales. (N.T. 4108-4109), why an interest expense factor of 7.5% was utilized, and how such interest rate was calculated. (N.T. 4111).

Although Dr. Kuehn's confusion is apparent from a reading of the transcript (N.T. 4003-4150), a reading does not make plain the great difficulty this witness had in responding to questions. On numerous occasions, Dr. Kuehn was unable to answer an inquiry without referring to documents, was unable to find the appropriate figure within the relevant document, and when a figure was located unable to state how it was calculated or why it was used. All of this shuffling of paper and accompanying long silences occurred before the jury. At one point it was necessary to call a luncheon recess in order to give Dr. Kuehn sufficient time to answer a question posed upon cross-examination. The total effect was that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained.

We also recognize that a flexible standard of proof applies where the defendant's wrong doing, here the de-

struction of plaintiff's business, had made it impossible, as a practical matter, for the plaintiff to produce a more precise figure, *see, Bigelow, supra* at 262-266, but in this case the brief trial on damages seemed almost an afterthought following the extended trial on liability. Plaintiff's action was originally instituted in 1974. The delay occasioned by the directed verdict for defendants at the end of the plaintiff's case at the first trial and the subsequent appeal prior to the instant trial on remand may be responsible for some of the deficiency in proof. It seemed obvious to the court that plaintiff's expert, a well-qualified and experienced witness, must have understood the basis for his conclusions when they were initially stated. However, on the witness stand as of the date of this trial, Dr. Kuehn was unable to explain, at least in an unconfused manner, the derivation of his figures or their basis in fact notwithstanding the time provided to him by the court for this purpose. Whatever the reasons for this inability, the trial court is convinced that the jury verdict could only be a product of confusion and speculation.

Mindful of the delay that has occurred since the limited remand, and the economic loss occasioned to plaintiff thereby in the erosion of the money judgment due to the difference between legal interest and the market rate, we are reluctant to incur even further delay and have considered whether the delay itself is a reason not to disturb the verdict of the jury. We also gave serious consideration to ordering a remittitur, an action within the trial court's discretion where a jury awards an amount the court deems excessive. 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[2] at p. 115-70 (1978); however, no reasoned basis could be found for setting an appropriate figure. The deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand.

Where there is no substantial indication that liability and damage issues are inextricably interwoven or that

the jury verdict was the result of compromise of liability and damage questions, a second trial on the damages alone is proper. *See, Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Darbrow v. Brown*, 255 F.2d 610 (3d Cir. 1958); 11 Wright and Miller, Federal Practice and Procedure §2814 (1973). In this bifurcated trial, it is clear there was no compromise of liability and damage questions. The separateness of the trials is also substantial indication that liability and damage issues are not inextricably interwoven. The court has also considered whether hearing the evidence on liability is necessary to persuade the jury to award damages in an adequate amount and is convinced that the case on liability can be stated to the jury with the facts and inferences most favorable to plaintiff, consistent with the verdict in its favor. Both the plaintiff and defendants will benefit from this opportunity to present damage testimony to the jury in a clear and unconfusing fashion. In any event, fairness to the defendant requires no less.

For the above reasons a new trial as to damages only is granted. An appropriate Order accompanies this Memorandum.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes X No__

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes X No__

2. (a) Do you find from the evidence that the relevant product market was: [CHECK ONE ONLY]

   (i) aluminum culvert and drainage pipe? X

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? ____

(iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? _____

(b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

(a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminim culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained?
or Yes X No__

(b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market?
or Yes X No__

(c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes X No__

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes X No__

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

/s/ FLORA EIKENKOETTER
Foreperson

Date: 8/16/79

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount; or "None" in the following blank according to your finding. $ 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount; or "None" in the following blank according to your finding. $1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 1, 1977?

   State such amount; or "None" in the following blank according to your finding. $ 710,000

/s/ FLORA EIKENKOETTER
Foreperson

Date: 8/21/79
5:30 p.m.

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of June, 1981, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. Plaintiff's Motion for Leave to File a Supplemental Brief is GRANTED.

2. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $57,000 in response to Interrogatory One as to damages and otherwise DENIED.

3. The Motion of defendants for a New Trial is GRANTED as to damages only.

4. A pre-trial/status conference will be held on *July 17, 1981* at *1:00 p.m.* to consider preparation of a case

stated on liability and any other further proceedings, including a special listing for trial, provided the Court of Appeals does not grant the pending motion to revoke the limited remand.

BY THE COURT:

NORMA L. SHAPIRO
J.

APPENDIX E

Memorandum and Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, *J.* JANUARY 17, 1983

INTRODUCTION

Before the court are post-trial motions arising out of a retrial on damages only in this antitrust litigation. Following the entry of judgment for plaintiffs on the jury's answers to four special interrogatories in the trebled amount of $9,567,939, defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on both liability and damages.

Plaintiff Columbia Metal Culvert Co., Inc. ("Columbia"), a liquidated corporation (interest in this litigation has been assigned to the present plaintiffs, its former shareholders), originally brought an action against KACC and KACSI, former Columbia salesman Robert A. Kennedy and his company, Kennedy Culvert and Supply, in which it alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §14. A detailed description of the specific actions complained of and the procedural history of this case is contained in the Memorandum accompanying the Order of June 17, 1981 published at 518 F. Supp. 102 (E.D.Pa. 1981).

At the first trial before The Hon. Edward N. Cahn, judgment in favor of defendants was entered on defendants' motion for a directed verdict at the close of Columbia's evidence on the grounds that Columbia, formerly a manufacturer and distributor of aluminum culvert pipe, had not established a *prima facie* case of conspiracy in restraint of trade between KACC and KACSI or between either and Kennedy, proved that Kaiser had monopoly power in the relevant product market, or established a *prima facie* violation of Section 3 of the Clayton Act. The Third Circuit affirmed the grant of a directed verdict as to Kennedy but reversed as to KACC and KACSI, except on the Clayton Act count. Sufficient evidence was presented to allow a jury to decide the relevant product market, whether KACC/KACSI had monopolized or attempted to monopolize that market, and whether KACC and KACSI conspired in violation of Sections 1 and 2 of the Sherman Act.

On remand and transfer to the docket of this court, there was a bifurcated trial by jury. The jury found on answers to special interrogatories that the relevant product market was aluminum culvert and drainage pipe, that KACC and KACSI had monopolized and attempted to monopolize the relevant product market, that KACC and KACSI had conspired in violation of Sections 1 and

2 of the Sherman Act, and that Columbia had been injured by the unlawful acts of KACC and KACSI. Damages awarded in the amount of $1,815,000 were trebled and judgment entered in favor of plaintiffs for $5,445,000. Following a direct appeal (because defendants post-trial motions were untimely filed), the case was remanded to this court by the Court of Appeals for disposition of Kaiser's motions for a judgment notwithstanding the verdict or in the alternative for a new trial.

We denied Kaiser's motions for judgment notwithstanding the verdict or a new trial as to liability because the evidence at retrial was not substantially different from that previously held adequate by the Court of Appeals; the jury's determination was not so against the weight of the evidence as to shock the conscience of the court. 518 F. Supp. at 102. However, judgment notwithstanding the verdict was granted as to the first interrogatory on damages (awarding defendants $57,000 for Columbia's increased usage of aluminum coil in 1971-73). *Id.* at 114. A new trial was granted on the second and third interrogatories, awarding $1,048,000 in lost profits from 1973 to May 31, 1977 and $710,000 for loss of going concern value thereafter.

Plaintiffs had presented only two damages witnesses, plaintiff Bonjorno himself and an expert, Dr. Alfred Kuehn. The record was found insufficient to establish the requisite factual basis to allow the jury to make a rational determination of the accuracy of Bonjorno's testimony. *Id.* at 115. Dr. Kuehn's testimony was found confused and confusing. "The total effect is that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained." *Id.* at 118. In sum, plaintiffs' evidence created a speculative verdict on damages. *Id.* at 117. Because the damages and liability issues were not inextricably interwoven, and there was no indication that the jury verdict was the result of compro-

mise on the liability and damage questions, retrial on damages only was ordered. *Id.* at 119.

The parties were requested to state their positions on procedure for a fair retrial on damages. Defendants had conceded at the argument on post-trial motions following the first trial that the court had the power to retry on damages only, but after the new trial on damages was granted, defendants argued that it would violate their constitutional right to trial by jury. However, counsel for defendants actively participated in discussions on the damage trial procedure.

At the outset of the damage trial, the court informed the jury of their duties. Because a jury in an antitrust matter must award only those damages that flow from the antitrust injury, *see*, 518 F. Supp. at 109, the opening statement was designed to acquaint the jurors with the nature of the antitrust violations that had been found. The jurors were told the parties, the businesses they were or are engaged in, the product and geographic markets involved, the antitrust laws the prior jury had found violated, the purpose of those laws, and the types of liability evidence presented at the prior trial. Finally, the liability interrogatories and answers of the prior jury (518 F. Supp. at 119, App. A) were read to the damage jury. (N.T. 20-25).

Upon the conclusion of this opening statement, counsel for plaintiffs made opening remarks not only on the evidence to be presented by plaintiffs during the retrial but also the liability evidence that had been presented during the prior trial. To provide the jury with an understanding of the activities that gave rise to liability, plaintiffs' counsel was permitted to list the types of activities by KACC and KACSI relied on by plaintiff to establish liability at the first trial: that defendants refused to sell raw materials to Columbia; located a new culvert manufacturing plant within forty miles of Columbia's plant to retaliate against Columbia for buying materials from another supplier; set up Kennedy, the former Co-

lumbia salesman, to compete with Columbia; instituted a "price squeeze," in which Kaiser raised the price of the aluminum needed to fabricate culvert but sold fabricated culvert at a constant price; and induced Columbia to buy a machine suitable for use only with Kaiser products unless modified at significant expense. (N.T. 32-41). Counsel for defendants responded to plaintiffs' statement on liability in his opening remarks. (N.T. 53-56).

The jury, answering four special interrogatories on damages (attached hereto as Appendix A), awarded plaintiffs $728,000 for actual losses, $742,520 for lost profits on the sale of aluminum culvert pipe, $80,000 for lost profits on the sale of flat corrugated aluminum sheet, and $1,638,793 for the diminution in the value of the business. Judgment in the trebled amount of $9,567,939 was entered on this special verdict. Kaiser defendants have again filed post-trial motions. Judgment notwithstanding the verdict is sought on the grounds that: the retrial on damages was improper because the jury was unable to award damages flowing only from the antitrust injury; damages awarded for lost profits duplicated damages for actual losses (Int. 2); the profit projections were unsupported by evidence and artificially enhanced by plaintiffs' use of an improper geographic area and understatement of certain expenses; and the plaintiffs' contentions in the trial on damages contradicted their contentions on the price squeeze in the trial on liability. Defendants also contest the period for which an award of damages on actual losses and lost profits was permitted. Defendants claim that damages awarded for lost profits from the intended sale of flat corrugated sheet (Int. 3) were speculative. Defendants claim also that allowing damages for loss of the value of a going concern (Int. 4) was improper because Columbia did not prove it ever actually terminated business during the damage period. Defendants contend that in any event the damage for loss of going concern value was overstated and was based on assumptions not supported by the evidence.

Defendants move in the alternative for a new trial on the grounds that the retrial on damages only was improper and prejudicial; the conduct of plaintiff's counsel was inflammatory; the court erred in its evidentiary rulings, charge and form of special verdict; and finally that the amount of the verdict was grossly excessive, shocking to the conscience, and the product of jury bias against defendants. Defendants' alternative motion for a new trial on damages only is denied. Defendants' motion for judgment notwithstanding the verdict is denied with regard to damages awarded in response to Interrogatories 1, 2 and 3 and granted as to damages awarded in response to Interrogatory 4. As a result, the jury's award is reduced by $1,638,793 (Int. 4) and the award remaining is in the total amount of $1,550,520. Therefore, when trebled, plaintiffs are entitled to entry of judgment in the amount of $4,651,560.

RETRIAL ON DAMAGES ONLY

KACC and KACSI (hereinafter referred to collectively as "Kaiser") object to the retrial on damages only ordered by the court on June 13, 1981 upon granting in part its motion for new trial. Kaiser contends that because it did not hear the evidence on liability, the damage jury was unable to determine which, if any, of the losses that Columbia suffered were actually caused by the antitrust violation. That such causation was required is clear. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type . . . that flows from that which makes defendants' acts unlawful. . . ."). However, the retrial procedure utilized did not in and of itself preclude rational jury determination of damages caused by the antitrust violations found by the previous jury.[1]

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1. In his opening statement, Kaiser's counsel "assured" the jury that Kaiser did not violate the antitrust laws or "any other law"

The Third Circuit has expressly approved the use of a retrial on antitrust damages in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); other cases in the Third Circuit are collected in plaintiffs' brief at Appendix C.[2] In that case the Court of Appeals found legal error in plaintiff's calculations of damages and remanded to the district court for a new trial on damages only. 531 F.2d at 107-09. We cannot presume that the Court of Appeals ordered a procedure that was *per se* violative of the rights of antitrust defendants. *Pueblo, supra* was decided after *Pitchford, supra*, but it was not the first case to hold that damages must be caused by defendant's antitrust violations and it may be assumed that the Court of Appeals was cognizant of a causation requirement when *Pitchford* was decided. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), for example, decided years before the remand for a damage trial in *Pitchford*, referred explicitly to the "necessary causal relation between the [violator's] conduct and the claimed damages. . . ." *Zenith, supra* at 125.

Defendants never requested that special interrogatories as to the alleged anticompetitive acts complained

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NOTES *(Continued)*

notwithstanding the prior jury's determination of liability. (N.T. 52). Kaiser continues to object to the prior jury's determination of liability. Indeed, Kaiser seemed to protest the very mention of the previous liability verdict to the damage jury. (Defendants' Brief at 22). Of course, informing the damage jury of the prior determination of liability was a necessary first step in a retrial on damages to ensure that the damages, if any were found, flow from the antitrust violations. The court made strenuous, although not altogether successful, efforts to limit reference to the issues resolved at the liability phase to the bare minimum required for the jury to understand and determine the damage issues. (Defendants' Brief 18-60; Plaintiffs' Brief, 26-54).

2. It has only recently been reported that the Court of Appeals for the Seventh Circuit has awarded a new trial on damages only in the MCI-AT&T antitrust litigation. *Philadelphia Inquirer*, January 13, 1983.

of by plaintiffs be submitted to the liability jury. (Defendants' Brief at 14-15, 23-24). Kaiser claims that the damage jury could not know which of the five alleged anticompetitive practices complained of by plaintiffs were actually relied upon by the jury that found it liable. But plaintiffs' economist did not attempt to and did not have to distinguish between actual losses caused by the various types of anticompetitive practices. Whether plaintiffs' losses were caused by one or more of the anticompetitive acts was immaterial on the damages issue so long as the jury was presented with competent evidence to prove the extent of plaintiffs' losses caused by Kaiser's impairment of the free and open market in aluminum culvert pipe. Plaintiffs' evidence was so directed. (*See, e.g.*, N.T. 509, 542, 548, 596). The charge to the jury made clear that the jury could only award damages for injury caused by Kaiser's conduct in the market:

> You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.
>
> Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum shortage, a lack of price protection for long-term requirement contracts.
>
> You may also consider whether or not plaintiffs' calculations should have taken into account poor business judgment or poor management. Some corporations suffer losses solely because of their own inadequate financial capitalization. You can't award plaintiffs damages for all its losses if you find that

> Columbia was under capitalized, that is that there was a lack of sufficient working capital and that losses were suffered as a result of that, because under such circumstances Columbia's financial inadequacies rather than Kaiser's conduct would have caused some portion of the losses.

(N.T. 1531-32).

Even if there were a serious question raised as to the propriety of a new trial on damages only, defendants waived objection to this procedure. Before issuing the June 17, 1981 Order granting the retrial, defendants spoke in favor of the concept. Addressing the court's question during supplemental oral argument on the post-trial motions on December 29, 1980, counsel for Kaiser stated:

> . . . With respect to the grant of a new trial with respect to damages alone, obviously, in our submission, the cases would support that kind of remedy.
>
> As to the mechanics upon the new trial, it seems to me, Your Honor, that there would, of necessity, simply be more to the trial than a review of the charts, testimony of Dr. Kuehn, or whomever the plaintiff wished to put on as a fact witness or expert witness. It seems to me there are additional matters relevant to damages and the amount of damages which also go to questions of causation. Those, as we have addressed in our post-trial briefs, deal with conditions in the marketplace that may have impacted upon Columbia's volume of sales, and hence on the amount of profit that it would have earned even assuming the existence of violations of the antitrust laws by Kaiser which also impacted upon Columbia.
>
> . . .
>
> With respect to liability, I believe that it would be sufficient to inform the jury that a verdict on liability has been established; that a jury has found that that

> violation of the antitrust laws caused some damage to Columbia, and it would be up to the jury to determine what the extent and amount of that damage was, and I believe that a trial could occur.

Docket Entry No. 510, N.T. 406. Defendants, having supported a new trial on damages before the jury's award at such trial was known, should not be permitted to object to the procedure itself just because its outcome is not to their liking.

But even if defendants are correct that a limited retrial on the issue of the amount of damages was so prejudicial to Kaiser as to constitute reversible error, the remedy can certainly not be a judgment notwithstanding the verdict in favor of defendants; at most defendants are entitled to a retrial on both liability and damages. That remedy does not lie with this court at this time. Following a bifurcated trial on liability and damages on remand from the Court of Appeals, this court denied a motion for a judgment notwithstanding the verdit on liability; judgment notwithstanding the verdict was granted as to one item of damages in the amount of $157,000 and a new trial granted as to the award of damages for lost profits ($1,048,000) and destruction of Columbia as a going concern ($710,000). But, that new trial was as to damages only for the reasons stated in the court's Opinion of June 18, 1981. At this juncture, the power of this court is limited to granting a new trial again on damages only. This was called to the attention of counsel frequently in the course of the trial in trying to assure fair procedures and prevent yet another retrial. (N.T. 97-99; 976-978). Therefore, the court concludes that defendants' objections to a limited retrial on damages are only to preserve them for the Court of Appeals which, of course, has the power to order a new trial on liability and/or damages.

JUDGMENT NOTWITHSTANDING THE VERDICT

The standard in this Circuit for the entry of judgment notwithstanding the verdict is clear. The court must interpret the evidence in the light most favorable to the verdict winner, and may grant the motion only if that evidence and the reasonable inferences to be drawn therefrom fail to support the verdict as a matter of law. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). *See also, Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Kademenos v. Equitable Life Assurance Society*, 513 F.2d 1073, 1074 (3d Cir. 1975); 6A *Moore's Federal Practice* §59.08[5] at 59-152 (1979). A directed verdict may be entered on only one or a combination of jury findings if a special verdict has been returned in accordance with Fed.R.Civ.P. 49(a). *See, Franklin Music Co. v. American Broadcasting Cos., Inc., et al.*, 616 F.2d 528 (3d Cir. 1979); *Fox v. Kane-Miller Corp.*, 398 F. Supp. 609, 649 (D.Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976).

Defendants concede this standard but contend that the court should enter judgment n.o.v. because the verdict is contrary to the evidence and unsupported in the record; that is, there is but one reasonable conclusion as to the proper judgment. Defendants argue this persuasively and well. Defendants' brief makes an excellent closing speech to the jury; the problem is that the jury heard it and nonetheless decided for plaintiffs. With the exception of damages for loss of value of a going concern discussed below, there is no error of law during the trial or in the court's charge to the jury on damages (N.T. 554) that would justify setting aside that verdict. The charge was fair and clear although relatively brief because it commented little on the evidence argued in detail by able counsel for both sides. But it touched on and

left to the jury all but one of the matters of which defendants now complain in asserting a right to judgment notwithstanding the verdict.

The Supreme Court stated in *Zenith, supra*:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof, which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

395 U.S. at 123. Accordingly, in an antitrust case, damages need not be proven with exactness or precision; rather, "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). The court does not have the prerogative of drawing inferences from facts within the exclusive province of the jury that are contrary to its findings without usurping the functions of the jury as a fact finding body. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). It was for the jury to determine the weight of the evidence and the credit to be given the witnesses, expert or otherwise; it has given its verdict accordingly. To set this verdict aside except for clear error of law would impermissibly intrude on the role of the jury in an antitrust trial.

DUPLICATION OF ACTUAL LOSSES AND LOST PROFITS

Kaiser contends that the award for hypothetical lost profits (Int. 2) duplicates the award for actual losses (Int. 1). Kaiser argues that these two types of losses are "irreconcilably contradictory and mutually exclusive." (Defendants' Brief at 64). *See, William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, 105 (E.D.Pa. 1946)

aff'd, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). In *William Goldman Theatres*, the plaintiff was unable to obtain first-run movies for his leased theater because of defendants' conspiracy to restrain trade. 150 F.2d 738, 742 (3d Cir. 1945). The district court declined to award out-of-pocket expenses actually incurred by plaintiff in connection with an alternative use of the premises in addition to the lost profits from the hypothetical operation of the business from which plaintiff was excluded by defendant's conduct. 69 F. Supp. at 105. Plaintiff's actual losses from the ineffective effort to mitigate damages were not causally connected with the losses from the intended use for which antitrust damages were awarded. *See*, 69 F. Supp. at 105.

However, Columbia was in business throughout the damage period as a culvert fabricator and distributor. To the extent it would have made profits in a free and open market, the antitrust laws provide compensation. Columbia incurred actual losses while running the business it contended it would have operated profitably but for the illegal conduct of the defendants. Plaintiffs' damages would have been reduced had Columbia actually made a profit during the damages period, and so plaintiffs may recover the net losses that were actually incurred in addition to the profits they would have made. Had Columbia made a profit, that sum would have been subtracted from hypothetical lost profits to arrive at the true measure of harm to Columbia. *Pitchford, supra* at 109. But plaintiffs suffered a loss rather than a profit and are entitled to subtract this negative figure from the hypothetical lost profits proved. (*See*, N.T. 55-56). The resulting calculation, the addition of actual losses to lost profits, is necessary to make plaintiffs whole.

LOST PROFITS ON ALUMINUM CULVERT PIPE

Plaintiffs utilized a market share theory to calculate their hypothetical lost profits during the damage period.

Plaintiffs' expert economist, Dr. Gary Bowman, calculated the amount of aluminum culvert pipe actually sold in the relevant market and then calculated the proportion of sales Columbia would have made absent an an antitrust violation. He sought to establish the number of pounds of culvert Columbia would have sold in a free and open market and multiplied that number by the estimated revenues Columbia would have received per pound. From this estimate of gross revenues he subtracted his estimate of Columbia's total expenses if there had been a free and open market. This type of analysis is proper in a case in which plaintiffs were deprived from competing freely in a particular product and geographic market, and the injured party need not produce the "kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra* at 116, 123-35.

An expert opinion on relevant damages issues is not enough to satisfy the plaintiffs' burden on damages unless that opinion is based on relevant data and the assumptions behind the opinion are shown to be realistic so that the jury has a rational basis for its decision. *In re IBM Peripheral EDP Devices Antirust Litigation,* 481 F. Supp. 965, 1012, 1020 (N.D.Calif. 1979). Plaintiffs presented expert testimony on all elements of the market share theory, their estimates of the size of the local market at issue, Columbia's share of the local and non-local markets assuming free and open competition, and Columbia's expenses in a free and open market; therefore, the record did not force the jury to engage in impermissible speculation.

Defendants argue that the jury's award of plaintiffs' claims for lost profits must be set aside because plaintiffs' projection of lost profits on the sale of aluminum culvert pipe is based upon assumptions unsupported and contradicted by the evidence in that:

a. the volume of sales in the so-called "local area" are deliberately overstated, contrary to the evidence in the record;

b. plaintiffs' proof on damages improperly deviated from the stipulated relevant geographic market; and

c. plaintiffs' projections of profits on the sale of aluminum culvert pipe were artificially and improperly enhanced by understating certain expenses.

The first step in estimating what a defunct business would have sold in a free and open market was to estimate the overall volume of the market. Plaintiffs' expert chose to use two geographic markets: local and non-local. The local, or "Vineland," selling market was the area covered by the approximately 150-mile radius surrounding Vineland, New Jersey, the location of Columbia's plant. The non-local market was the remainder of the geographic market for which plaintiffs seek damages. Plaintiff's stated rationale for using two markets was that Columbia would have commanded a significantly greater proportion of sales in the local rather than non-local area — 50% rather than 30%.

Thus, if plaintiffs' estimate of the number of pounds sold in the local market was too high because it took into account pounds that were sold in the non-local market, the figure for the total number of pounds of pipe sold by Columbia would be inflated, since the local poundage is multiplied by .5 but the non-local by .3. It is plaintiffs' burden to put into evidence a reasonable and rational estimate of the size of the market. *Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 911-12 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). Where conflicts as to credibility exist as to certain estimates, they are to be resolved by the jury.

Defendant points out that Dr. Bowman used figures for the so-called "local market" that included non-local

sales although Dr. Bowman asserted to the contrary. (N.T. 609). Under cross-examination, Dr. Bowman stated that he obtained his estimate of local market sales by adding sales from Kaiser's New Castle, Delaware plant to Columbia's Vineland sales. This approximately 150-mile local sales area included all of New Jersey, Delaware, most of Maryland, approximately the eastern third of Pennsylvania and very small portions of Virginia, West Virginia, and New York. Ex. D-150 (Map of Eastern United States with 150-mile radius of Vineland delineated). Kaiser introduced uncontradicted deposition testimony that New Castle sales include sales from the entire state of "Virginia, West Virginia, Maryland, Delaware, New Jersey, Pennsylvania." (N.T. 886). Dr. Bowman used an "adjusted territory pounds" figure and then assumed that included only sales within the local area (N.T. 610); Kaiser argues the invalidity of that asssumption. Kaiser's evidence tends to establish that significant sales were made outside the local area that Dr. Bowman considered the local market; Dr. Bowman admitted that if such were the case, his figures would have to be adjusted. (N.T. 611). Kaiser argues that because the jury had no basis upon which to adjust Dr. Bowman's inflated figures, Dr. Bowman's opinion on the total pounds of culvert sold by Columbia permitted the jury to speculate as to the total size of the market.

But Dr. Bowman told the jury he divided the entire market into two shares basically for two reasons: Columbia would have made more sales in an area closer to its plant, and Kaiser data from its New Castle and Schenectady plants was available. The local market focused on Kaiser sales areas and was not strictly speaking an area within a 150-mile radius of Vineland, New Jersey as defendants contended. Since Kaiser was the dominant selling force in the total market, Kaiser sold most of the aluminum culvert pipe, and the Kaiser data provided a natural factual basis for the computation of the market. On plaintiffs' proof of its damages from Kaiser's violation

of antitrust laws, Kaiser does not have standing to complain about its data not providing a precise "geographical fit" to the relevant geographical market in this case.

Q. Why did you pick those two areas? Why did you make that division?

A. Generally speaking the reason for making any division if you divide an overall market area into subareas you get a somewhat more accurate projection. That is the share of the market Columbia would have had in the near areas is bigger than it would have had in the further away area. The reason I chose those two areas is that that is the way Kaiser's statistics were broken down. It was convenient. They had figures for sales to what they called the New Castle area, and they had sales outside of that that I called sort of loosely the non-local area which also may be called the Schenectady area. Since I couldn't breakdown Kaiser's figures any other way and I had Mr. Bonjorno available to tell me how his sales broke down between the two areas as defined by Kaiser it was convenient to use those two breakdowns rather than a breakdown of the overall market into two submarkets.

Q. Once you had decided to make that breakdown, what was the first thing you then did with the data you had available?

A. Once I had the breakdown I wanted to see what kind of market share each of the companies would have had, specifically what market share Columbia would have had over the period '74 through '77.

Q. Did you attempt to determine what volume had actually been sold in each of those areas?

A. Yes, I did. I described that earlier. I'm sorry, that is clearly the first step. You have to know how much was sold in each of the areas over the period.

(N.T. 305-6; Dr. Bowman).

Plaintiffs contend that, even if their estimate of total pounds sold in the local market was inflated by overstatement of the size of that market, Kaiser could have introduced its own data demonstrating the size of the local market. (Plaintiffs' Brief at 69). Defendants chose instead to attack the credibility of plaintiffs' evidence at trial and its adequacy post trial. But once the jury has determined the credibility issues adversely to defendants only the issue of adequacy remains and the standard of proving damages is liberal. *Bigelow*, *supra*. That standard has been met if plaintiffs' expert is to be believed.

To determine the number of pounds of aluminum culvert pipe Columbia would have sold absent Kaiser's antitrust violations, Dr. Bowman multiplied the total poundage that would have been sold by all companies by his estimate of Columbia's share of the local and non-local markets. If that estimate had no basis in fact, the resulting calculation had no basis in fact and the jury in considering it would have been speculating in arriving at its verdict on lost profits.

Dr. Bowman determined that in a free and open market Columbia would have almost only Kaiser as a competitor and that Columbia would have obtained 50% of the sales in the local market and 30% of the sales beyond the local market.

Q. Now, why did you select fifty per cent — well, for the three years '75, '76 and '77, why did you use that specific figure [for the local area]?

A. Basically because there were two competitors in the marketplace. Basically was Kaiser and Co-

> lumbia, and basically they were equally situated.
>
> It is true that Columbia was developing its position, but fundamentally regarded them as equally situated competitors, and I think they would have shared the market equally.

(Examination of Dr. Bowman, N.T. 507). The credibility of Dr. Bowman's analysis of the relative strengths of Columbia and Kaiser absent antitrust violations was a question for the jury.

However, Dr. Bowman was obliged to demonstrate that he took other potential competitors into account in concluding that a fully competitive aluminum culvert market would be a duopoly. Under cross-examination Dr. Bowman asserted that he took such other firms into account but considered their influence negligible.[3]

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3. After stating there were two "major" sellers, he was asked about a third company:

Q. So there was a third company. Is it also known as Lane Metal Products?
A. Yes, I had forgotten —
Q. This is a company that is a subsidiary of Bethlehem Steel?
A. Yes, I understand it is.
Q. So you found a third company, Lane, in the local area, selling aluminum pipe in the local area?
A. Yes, that's correct.

* * * * * *

Q. Why didn't you take Lane into account when you were estimating 50 per cent in the local area?
A. Because Lane was only a very small factor in that market, more negligible.
Q. You mean in reality, they were a small factor? You tried to determine how many pounds they sold or something and you determined they didn't sell many pounds?
A. No. They would have been a small factor. I was making projections of what Columbia would have done in free and open competition.
Q. I am talking about Lane, not Columbia.
A. I thought you were asking about Columbia's 50 per cent share of this sub-area, the local area, and that is what I was

At the trial Kaiser vigorously attacked Dr. Bowman's assumption that Columbia could have had 50% of the sales in the local area and 30% of the non-local sales. Defendants' witnesses were allowed to testify about possible competitors of Columbia and the entry into the aluminum culvert market of steel culvert producers. Kaiser's expert contested Columbia's alleged share of the market and testified to the fallacies of Dr. Bowman's analyses. Problems in comparing Kaiser's calendar year figures and Columbia's fiscal year figures were also developed at length. Dr. Bowman placed before the jury a market share estimate of his view of Columbia's position

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attempting to respond to.

Q. What I am trying to determine is did you take into account whether Lane would have any market share in this local market?

A. I took that into account, yes. I considered them as a possibility, certainly.

Q. Well, did you try to estimate what share they would have gotten?

A. I — yes.

Q. What did you come up with?

A. My analysis suggests that the share they would have gotten would have been very small, essentially negligible.

Q. Essentially negligible?

A. Yes.

Q. [N]either Lane nor Columbia in the non-local —local area were much of a factor, yet you gave Columbia 50% of business and you gave Lane one or 2%. Why is that?

A. Because of the position that Columbia was in, with the facilities they had, production facilities, the ability to produce, the kind of equipment they had, the marketing strategy, the product line they offered, the expertise, the kind of connections they had in the business. They were doing fairly well in '73. As a matter of fact, they had 38% of that local area in 1973.

Q. Did you make any analysis —similar analysis of Lane Metal Product as a subsidiary of Bethlehem Steel to see if they had the ability to market in this area under your projections?

A. I didn't do a specific detailed study of Lane, no, I did not.

(Cross-examination of Dr. Bowman, N.T. 613, 614-15, 617).

in an open market. Since it had some support in the evidence, Dr. Bowman's evaluation of the non-local market and his disregard of competitors was for the jury to consider and evaluate.

After Dr. Bowman estimated how much pipe Columbia would have sold in unrestrained local and non-local markets, he multiplied these figures by the estimated selling price for each pound of pipe to ascertain Columbia's gross revenues. The next and final step in estimating the lost profits was to deduct Columbia's estimated expenses in a market free of Kaiser's antitrust violations.

Defendants contend several aspects of Bowman's projected expenses are unrealistically low. But to the extent Dr. Bowman's estimates were supported by some evidence on the record, we cannot state that the jury had no basis upon which to base its evaluation. Dr. Bowman arrived at a figure for Columbia's hypothetical interest expense that was quite low. The actual rate at which Columbia was able to borrow during the damage period was 3.75% above the prime rate. This money was obtained from Columbia's sole banking lender, the Philadelphia National Bank. Dr. Bowman found the average prime rate during the damage period to be approximately 8% (N.T. 559). Instead of using the average percentage of 11.75% — prime plus 3.75% — for Columbia's borrowing costs, Dr. Bowman estimated that in a free and open market Columbia's interest rate would have been 9.5%, the 1975 BAA bond rate. (N.T. 559).

Dr. Bowman admitted that companies of Columbia's size "would not generally borrow with bonds; that is, they tend to borrow directly from a bank instead of a bond." (N.T. 559). But there was testimony from the PNB bank officer for the Columbia account, that had Columbia not been injured by Kaiser's anticompetitive acts it would have been able to borrow funds more cheaply (N.T. 1310); the jury was informed that this bank would recover its unpaid loans (in excess of $320,000) from any

award to plaintiffs. But the basis for Dr. Bowman's hypothetical interest rate was not "thin air." *In re IBM, supra* at 1019. There is no justification for entering a judgment notwithstanding the verdict on lost profits on the sale of aluminum culvert pipe.

LOST PROFITS ON CORRUGATED ALUMINUM SHEET

Columbia's business was fabricating culvert pipe. Although it never actually engaged in any other business, plaintiffs contend that Columbia was ready and willing to begin fabricating flat aluminum sheet, the product from which other fabricators make riveted rather than spiral pipe, and would have been able to do so but for Kaiser's antitrust violations. Therefore, plaintiffs sought, and the jury awarded, hypothetical lost profits on the sale of corrugated sheet. There was evidence that production facilities were modified to manufacture corrugated sheet during 1974, and Bonjorno estimated he could have sold 750,000 pounds of corrugated culvert sheet in 1975, 1½ million pounds in 1976, and 2 million pounds in 1977. (N.T. 205).

To allow the award of lost profits for a business that was never actually in operation, the court must first decide whether plaintiffs' entry into such line of business would have been a natural outgrowth of an established business or an expanson into a new market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Relevant considerations include the "history of the expansion and growth patterns of other competitors in the relevant market," whether production facilities have to be varied significantly, and whether "customers for one unit would in all likelihood remain customers for other units." *Id.* Plaintiffs presented no direct evidence that the production of flat sheet was a natural outgrowth of pipe fabrication, but there was some evidence, if be-

lieved, that Columbia would have had other fabricators as sheet customers even though the customers for pipe would be direct users. There was evidence not only that the production facilities could be readily modified but that Columbia had so modified them and was equipped to manufacture and supply corrugated tube sheets after 1974 (N.T. 201-5). Therefore, the production of corrugated sheet could have been a natural outgrowth of Columbia's culvert business.

The court's second step is to determine whether plaintiffs presented sufficient evidence to allow the jury to determine that plaintiffs had an intention to enter the business and were prepared to do so. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). There is much evidence if credited that plaintiffs had the requisite intention, but the record is not as clear that they were so prepared. The Fifth Circuit has listed four elements of preparedness: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plantiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business. *Id.*, *quoting Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

Plaintiffs were unable to finance the purchase of the raw material (aluminum coil) needed to manufacture the corrugated sheet. (N.T. 202). Mr. Bonjorno claimed this was because prices of the finished pipe had been so depressed by Kaiser that it was not economically profitable for customers to buy corrugated sheet, make it into riveted pipe and sell it at a competitive price. (N.T. 186, 202). Bonjorno's assertion that the price of finished pipe was depressed by Kaiser was contradicted by other evidence presented by plaintiffs at trial.

Dr. Bowman testified that in a free and open market the selling price of pipe can be broken down as: 65% for

aluminum costs, 25% for other production costs, and 10% for profits (N.T. 537). Taking the cost of aluminum obtained from Alcoa's price lists published during the relevant years (N.T. 538), Dr. Bowman calculated the hypothetical unrestrained selling price of pipe. In Dr. Bowman's words, Kaiser's prices were "substantially the same" as those projected for a free and open market. (N.T. 1480). But the credibility of Bonjorno's explanation for Columbia's inability to enter the corrugated sheet market, whether he might have consummated a contract with Alcoa or sold corrugated sheet to Syracuse Tank, Lane Pipe or others and Columbia's readiness to enter the corrugated sheet business were all for the jury not the judge to assess.

GOING CONCERN VALUE

Defendants argue that plaintiffs cannot recover damages for loss of Columbia's value as a going concern because Columbia had not "terminated its business . . . as a consequence of an antitrust violation by Kaiser." (Defendant's Brief at 105). We agree.

A business that is forced to shut down because of antitrust violations is entitled to damages for loss of going concern value if proved. VonKalinowski, 15 *Antitrust Laws and Trade Regulation* §115.03[4] (1978) (citing cases). This was recognized in our Opinion of June 17, 1981 which rejected an argument that the damages awarded were duplicative. The Opinion recognized that losses for past net profits and reduction in the value of a business are not duplicative absent unique circumstances. Defendants argued that plaintiffs' recovery of lost profits and their receipt of $574,000 from the sale of Columbia's assets to Howmet Aluminum Corporation ("Howmet") necessarily fully compensated them. But the value of the business as a going concern might have exceeded the amount received from Howmet at the time of sale were it not for the anticompetitive conduct of the

defendants. Therefore, an award of damages for loss of value as a going concern was held non-duplicative of actual losses or projected losses from 1974 to 1977 and non-duplicative of the money received from the sale of Columbia's assets ot Howmet, so long as the damage award for going concern value was properly adjusted to reflect only goodwill, that is, the discounted present value of the estimated flow of future earnings.

However, that opinion was based on the erroneous impression that the sale of Columbia's assets to Howmet was in May, 1977 the end of the damage period. At that time we did not have the argument on the correct facts more fully developed on the present record: that Columbia was a going concern in May, 1977. Significant intervening factors interrupted the causal connection between plaintiffs' antitrust violations and the going concern value of Columbia as of December 20, 1978 so that it would have been improper to allow recovery for loss of profits as a going concern on that date. To the extent that we stated plaintiffs were entitled to both the lost past profits as of the time of the sale to Howmet (December 20, 1978) and the loss of value of the business as it would have been absent defendants' violation of law in May of 1977, we were in error because it is now clear that Columbia's business had not been terminated as of that date losses were allowed for its termination or destruction.

For recovery of "going concern" damages as well as any antitrust damages, it is well established that a plaintiff cannot prevail merely by proof that the defendant has violated the antitrust laws. He must prove that the violation had a causal relationship to the particular loss of anticipated revenue, that is, that the particular damage to plaintiff flowed from the conduct of the plaintiff. *Rea v. Ford Motor Company*, 497 F.2d 577 (3rd Cir. 1974), *cert. denied*, 419 U.S. 868 (1979). *See also, Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830, 833 (3rd Cir.), *cert. denied*, 371 U.S. 829 (1962). Going con-

cern damage is designed to compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation. Schneider, *Damages for Termination of a Business Interest*, 49 Antitrust L.J. 1295 (1980).

Antitrust cases concerning "going concern" or "goodwill" damages assume destruction, forced sale or other termination of the business as a necessary predicate to recovery. *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980) (termination of office equipment dealership); *Pitchford, supra* (termination of scientific instruments dealership contract); *Albrecht v. Herald Company*, 452 F.2d 124 (8th Cir. 1971) (forced sale of newspaper carrier's route); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (termination of service station lease and dealer contract); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963) (cancellation of service station lease and lessee's dealer sales arrangement); *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied* 343 U.S. 942 (1952) (forced sale of 15-year lease on motion picture theater).

The calculation of going concern value is made as of the date the plaintiff's business was terminated or sold as a result of the illegal conduct. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3rd Cir. 1977), *cert, denied*, 434 U.S. 1086 (1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970). As stated in *Farmington, supra*, "going concern" represents "the value which the business would have had at that time but for [the defendant's] illegal activity." 421 F.2d at 81. Accordingly, not only must there be a sale or cessation of the business but the date must be at the end of the damage period.

Plaintiffs operated their business as a going concern for approximately five months after May 31, 1977,[4] but plaintiffs elected May 31, 1977 as the end of the damage period. A government loan of $600,000 on or about that date permitted Columbia to continue in operation:

> Q. Now you said that the end of the damage period for which you are seeking damages is May — is what, I'm sorry.
>
> A. May 31, 1977.
>
> Q. Why did you pick that as the end of the damage period?
>
> A. It was just about that time or shortly thereafter that we received the proceeds of the EVA [sic EDA] loan, and the metal that the proceeds permitted us to purchase. Had it not been for that loan we would have then had to close our doors once and for all, and we felt that that represented a conservative and fair place to end the damages.

(N.T. 167).

Therefter, plaintiffs, supplied with aluminum by Alcoa, operated their business as a going concern. Plaintiffs sold Columbia on December 20, 1978, over a year after May 31, 1977, the date plaintiffs concede to be the end of the damage period. The proceeds of a loan of $600,000 plaintiffs received from the Economic Development Administration of the United States Department

4. Although Columbia suspended its production, it never ceased doing business altogether prior to May 31, 1977:

> Q. Was Columbia Metal open and in business until at least May 31, 1977?
>
> A. Yes, we were.
>
> Q. Had you ever closed your doors?
>
> A. No, we never had.

(N.T. 150 — Bonjorno).

of Commerce were used in the manufacture of steel and aluminum pipe:

Q. And after it got the $600,000, Columbia went back into operation, did it not?

A. Yes, it did.

Q. And during that time it made aluminum and steel pipe, did it not? . . .

A. We made some small quantity. We tried to make some small quantity of steel pipe, yes.

Q. And you made aluminum pipe?

A. Yes, we did.

Q. What company supplied you with aluminum?

A. Alcoa.

Q. How long was Columbia in operation after it got the $600,000?

A. Approximately five months.

Q. And you stopped production again?

A. Yes.

(N.T. 296-7).

Although the jury could reasonably have used May 31, 1977 as the end of the damage period for purposes of calculating lost profits, it could not as a matter of law apply this date as the commencement of "going concern" damages. May 1977 was not the time of business termination but rather the time of its rejuvenation. By the time Howmet purchased Columbia the following year and began to reoperate as Howmet Columbia (N.T. 756-57), the going concern value of the company was substantially altered by the receipt of the government loan and numerous other market forces during the period of operation and thereafter.

With respect to going concern damages, the loan of substantial government funds in May, 1977 is not simply another factor to be accounted for by the jury in its overall assessment of the amount of damages due. The $600,000 EDA loan made it possible for Columbia to continue in operation as a going concern. For although Columbia ceased its production in 1975, it "kept its doors open" and renewed production in 1977 *as a result of the EDA loan*. (N.T. 167-69). A business which is in operation, as was Columbia in May, 1977, cannot receive damages for loss of profits it would have had as a going concern. Loss of going concern value is for a concern no longer going, that is, terminated by liquidation or forced sale.

Plaintiffs filed this action in Janaury, 1974; at trial they chose May, 1977 as the conclusion of the damage period; they foreclosed their ability to recover damages for the time they continued to operate with government financing. The cessation of their operations five months thereafter and sale of the assets of a defunct operation one year after that cannot be attributed to Kaiser on this record. If the jury were to go beyond the damage period to the actual date of sale, charge Kaiser with responsibility for the sale and then assess going concern damages flowing from defendants' activities as of December, 1978, the jury would be forced to rely on prohibited speculations and guesswork.

> If . . . the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess as to its occurrence, then a judgment notwithstanding the verdict is required.

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1099 (3rd Cir. 1980) *citing Denneny v. Spegel*, 407 F.2d 443, 442 (3rd Cir. 1969) and *Neville, supra* at 1210 n.5.

The uncontested testimony of the plaintiffs that the EDA loan made possible the continued operation of the business beyond the damage period barred recovery for future loss of profits as a going concern as a matter of law even if the record is viewed in the light most favorable to plaintiffs. Therefore judgment for defendants notwithstanding the verdict will be entered as to the damages awarded in Interrogatory 4. We find it neither necessary nor appropriate to grant a new trial because of this issue. A new trial could not change the result as to these damages; the evidence as to the other items of damages and its consideration by the jury was sufficiently distinct to permit their award even if the damages for loss of going concern value is set aside.

Defendants assert several other grounds for the deficiency of the evidence on going concern value, including that the capitalization of profits should have been on a pre-tax instead of after-tax basis and that the use of a 10% capitalization rate was too high for a company such as Columbia. Defendants argue these points persuasively but upon evidence not offered at trial or the proper subject of judicial notice at this time; without such evidence on the record it is inappropriate for the court to consider it in the context of post-trial motions. In any event, these matters are moot in light of our denial of going concern damages on other grounds.

OTHER GROUNDS FOR JUDGMENT N.O.V.

Three other contentions of defendants in support of judgment in their favor notwithstanding the jury verdict for plaintiffs merit discussion.

Defendants objected to the admission of evidence on lost profits on sales beyond the relevant geographic area as stipulated by the parties.[5] The evidence of non-local

5. The stipulated area extended north through Rhode Island, south through Northern Virginia, and west through eastern Pennsylvania.

sales which was the basis of plaintiffs' projections undeniably extended beyond the geographic area agreed to by the parties for the purpose of determining liability. But it was not agreed to as a limitation on plaintiffs' damage estimates. As long as there was some evidence that Columbia would have made sales beyond that geographic area, as there was, plaintiffs were entitled to have the jury consider those estimated sales. *Pitchford*, *supra* at 108-09.

Defendants contend that whatever the actual losses or lost profits, for all practical purposes, Columbia's business was terminated prior to 1977 so that damages could not in any event be awarded beyond 1975. This issue was vigorously pursued on examination and cross-examination of witnesses for both sides and argued to the jury thereafter. The jury was instructed to award damages only for those years during which it was reasonable for Columbia to have continued to operate its business for purposes other than the claim of damages in suit. (N.T. 1540-41). The jury had an adequate basis upon which to decide the length of time for which damages might be awarded to plaintiff.

Defendants also contend that the judgment should be set aside because plaintiffs' theory of damages and the evidence adduced to support it contradicted the theory of liability based upon a "price squeeze." Among the joint activities of defendants relied on by plaintiffs at the trial on liability was a "price squeeze" by which KACC raised the price of aluminum sheet sold to other fabricators; aluminum sheet was transferred to KACSI at a price that permitted KACSI to sell Kaiser fabricated culvert at a low price with which other fabricators could not complete. That is, the difference between the price of the raw material charged by Kaiser and others, such as Alcoa, presumed to follow its lead, and the price charged for the finished product by Kaiser made it impossible for other companies not vertically integrated to sell the finished product competitively.

In this trial on damages, the calculations of plaintiffs' expert on prices in a free and open market tended to contradict the "price squeeze" theory. The prices he used for raw material (aluminum coil) were the actual prices charged by Alcoa in 1974-77 at which time it allegedly followed the lead of Kaiser. He used these prices to establish a fair selling price in a freely competitive market; those prices were admittedly nearly identical to the average direct selling price actually charged by Kaiser in the damage period. (N.T. 1478-80). Plaintiffs' expert also testified that the relationship between metal cost and the selling price of culvert pipe in a free and open market would have been 65% of sales; Columbia's financial statements for the year 1970 through 1975 showed a raw material cost approximating 65% of sales in each year. Thus, plaintiffs' evidence at the retrial on damages cast some doubt on a "price squeeze" as the basis for liability.

But a "price squeeze" was just one of a number of activities relied upon by plaintiffs at the first trial from which liability might have been found. There was sufficient evidence from which a jury might have inferred that KACSI: attempted to drive Columbia out of business; threatened to place a plant near Columbia if it purchased raw material from other than Kaiser and then later opened a plant in Delaware that had originally been planned for Virginia; charged lower prices from that plant, particularly in southern New Jersey; and extended credit to a former salesman of Columbia against the recommendation of KACSI's credit department. A jury finding on the anticompetitive significance of each of these acts was not requested and no special interrogatories were submitted as to which of the alleged categories of activities violated the Sherman Act or caused antitrust injury to Columbia.

At the first trial plaintiffs estimated damages by using four projection Methods (Methods C, D, E, and F). Method C (P-3012) projected Columbia's sales based upon government figures on new housing starts and new

highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendant's wrongdoing. At the time the post-trial motions were decided it did not appear liability and damage issues were inextricably interwoven. The trial on damages and liability had been bifurcated by agreement of the parties, so that there seemed little basis to believe the jury verdict would have been the result of compromise on the liability and damage issues. Because the liability and damage issues seemed sufficiently distinct and severable, a new trial on damages only was deemed fair to both parties and was so ordered. But *cf., Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981) (plaintiffs' failure to prove five of six alleged exclusionary activities and lack of certainty that jury based its verdict exclusively on the one remaining practice required all findings on liability set aside; a partial new trial limited to redetermination of damages held improper unless it clearly appeared the issue to be retried was distinct and separable).

Notwithstanding the vigor with which plaintiffs' urged the unassailability of their damage evidence on their motion for reconsideration (later withdrawn), at the damage retrial plaintiff proffered a different expert and a different method for calculation of Columbia's hypothetical share of a freely competitive market. This new testimony on damages if heard by the liability jury might have influenced it to reject or discount the contention of a "price squeeze" by the Kaiser defendants. But this circumstance certainly does not compel the entry of judgment in defendants' favor notwithstanding the verdict. At most it reflects the unforeseen difficulties arising from a limited retrial on damages. Since the court rules now

only on post-trial motions concerning the retrial on damages, this consideration is for the Court of Appeals.

The court has considered all other arguments for the entry of judgment notwithstanding the verdict and found them to be without merit.

MOTION FOR NEW TRIAL

When a party moves for judgment notwithstanding the verdict or in the alternative for a new trial, and the court grants judgment notwithstanding the verdict, it is imperative that the court rule on the new trial request so that the litigation will not be needlessly protracted if the judgment is thereafter vacated or reversed by the appellate court. Fed.R.Civ.P. 50(c); 15 Wright & Miller, *Federal Practice and Procedure* §2539 (1971). Defendants advance four grounds for a new trial: that the conduct of plaintiffs' witnesses and counsel was prejudicial and improper; that the verdict was against the weight of the evidence; that the verdict was excessive; and that legal errors were committed throughout the trial.

Plaintiffs' counsel and witnesses during the retrial made some remarks irrelevant to damages issues and prejudicial to Kaiser. Notwithstanding extended discussion with counsel prior to trial and admonitions to counsel during the trial, the findings on liability were overstated or referred to unnecessarily. The testimony of plaintiffs' principal witness conveyed resentment of Kaiser which was not surprising. It seems that a trial limited to damages presented difficulties to counsel for both parties. But these were lapses from perfection in the course of lengthy, complex and vigorously contested proceedings. After reviewing the record as a whole and the instructions to the jury to consider only the issues on damages without prejudice or bias, we are of the opinion that the conduct of plaintiffs' counsel and witnesses does not warrant a new trial on damages.

A new trial may be granted on the ground that the verdict is against the weight of the evidence. *Neville, supra;* 6A *Moore's Federal Practice* ¶59.08[5] (1982). In terms of the amount of damages awarded, a new trial may be granted when the damages assessed by the jury are "so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979). Stated either way, such a motion for a new trial is within the sound discretion of the court. *Id.* at 153. In exercising its discretion, the court may weigh the parties' evidence instead of looking only to whether the verdict winner has introduced sufficient evidence on each essential element to preclude judgment as a matter of law. *Moore's Federal Practice, supra.* Greater scrutiny of a verdict is called for when the trial is "complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960).

Even on a motion for a new trial judicial discretion must be exercised in a manner consistent with plaintiff's right to a trial by jury. The court may not substitute its own judgment for that of the jury merely because the judge as the finder of fact might have reached a different conclusion. That well established principle is not obviated simply because the trial is bifurcated.

> (N)either a trial nor an appellate court has the authority to substitute its judgment for that of the jury and thus usurp the jury's function as the principal finder of fact.

Collins v. Signetics Corp., 605 F.2d 110, 115 (3d Cir. 1979).

At the prior trial this court was guided by that principle. Based on the law of the case determined by the Court of Appeals, it found that evidence sufficient to support the jury's conclusion that defendants monopolized or attempted to monopolize the relevant product market in violation of Section 2 of the Sherman Act. The jury's

determination on liability was not so against the weight of the evidence as to shock the conscience of the court. But the deficiency in plaintiffs' proof of damages convinced the court that the verdict as to damages should not stand. The evidence presented by the damage witnesses was incomplete, confusing and lacking in probative value and the factual basis for the estimates of losses was not made clear by the testimony. Since the damage award on that inadequate record had to be vacated, no explicit statement as to excessiveness was deemed necessary to the decision. After a retrial on damages at which plaintiff offered a different expert on damages and a new theory of the measure of damages or at least a new way of calculating damages, the court is faced with a difficult question: if plaintiff could not substantiate an untrebled award of $1,815,000 at the first trial on damages, what is the effect of an untrebled award of $3,189,313 at this trial?

The record on retrial was different and more fully developed. The evidence was sharply in conflict; the issues were pointedly raised by the direct testimony and extensive cross-examination. Almost all of Bonjorno's statements on the financial history of his company, the state of the market for the years in question, his future intentions and the prospects of Columbia required credibility determinations. The implausibility of deeming Columbia an operating business between 1975 and 1977 was effectively raised. The witnesses on behalf of plaintiffs were subject to impeachment for lack of knowledge, prejudice against Kaiser or interest in the outcome of the case. The assumptions of plaintiffs' expert on the size of the market, Columbia's projected 50% share of a local market and 30% of the entire market were challenged as ignoring viable competitors, inflating revenues and deflating expenses. But all of this was placed before the jury by a fair charge; its role as factfinder in weighing the contradictory evidence and inferences and in drawing the ultimate conclusions as to the facts cannot properly

be ignored. Whether the trial judge would reach the same conclusions is irrelevant. So long as evidentiary support for their jury findings exists, "we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Therefore the court must refuse to set aside this verdict as excessive and respect the role of the jury in judging the credibility of the witnesses, assessing the weight given to expert opinions and resolving conflicting evidence.

Two judges have previously taken these questions from a jury. At the initial trial, a verdict was directed for defendants at the end of the plaintiffs' case on the ground that the evidence was insufficient to establish a market composed of aluminum culvert pipe or a monopolization of the relevant culvert pipe market and there was insufficient evidence of conspiracy in restraint of trade. The Court of Appeals reversed and remanded for trial. Following that trial, judgment on the verdict in favor of plaintiffs on liability and damages was set aside and a new trial ordered on damages only. Now this court is requested to set aside a second award of damages by another jury.

"Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." *Louisville & Nashville Railroad Co. v. Woodson*, 134 U.S. 614, 623 (1980). Wright and Miller, commenting on this dictum in *Federal Practice and Procedure*, Vol. 11 §2803 at p. 35, observes:

> Of course there is no question but that a third trial may be ordered when the second trial, like the first, has been marred by a legal error. The more difficult question is whether the trial court may set aside successive verdicts as excessive, or against the weight of the evidence. That the power to do so exists seems perfectly clear, but it is equally clear that it is a power

> to be exercised only in the most exceptional cases. When two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight. [Footnotes omitted].

The usual circumstances weighing against the exercise of discretion in ordering a third trial on damages were well expressed by the trial judge in *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 380 F.2d 628 (D.C. Cir. 1970):

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances, *a fortiori* a second verdict reaching substantially the same result on practically the same evidence should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. It may well be that if another new trial were granted, the same result would again be reached by a third jury.

177 F. Supp. at 923.

Here these circumstances are not present. The first new trial on damages was granted because there was a lack of an evidentiary basis for expert estimates not just because the verdict was against the weight of the evidence. Moreover, on retrial plaintiffs (perhaps because of the inadequate testimony of their previous damage expert), presented not only a different expert but a different theory of damages or at least a far different method for its calculation. So there has not been a second verdict reaching the same result on practically the same evidence.

But a trial judge should still pause before setting aside this second verdict because of the peculiar procedural posture of this case. The court's discretionary grant of a new trial is now limited to retrial on damages only. Defendants strenuously object to the fairness of this procedure (Defendants' Brief, pp. 18-60) and have preserved for appeal their argument that in practice if not in theory it was prejudicial error. It may be that if another new trial on damages were granted, the same result might again be reached by a third jury but would again be subject to the same objections, reviewable only on appeal. This court's determinations on liability will also be reviewed when this matter is again considered by the Court of Appeals. There may be no retrial at all but if there is to be a one, guidance from the Court of Appeals on the determination of the liability issues and the scope of the retrial is in the interests of the administration of justice and the need of the parties for the final termination of this litigation.

For the above reasons, a new trial as to damages is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia? None__ $ 728,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe? None__ $ 742,520

3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet? None__ $ 80,000

4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business? None__ $1,638,793

WILLIAM H. WHITTINGTON
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL WHEN DELIBERATIONS HAVE BEEN COMPLETED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $1,638,793 in response to Interrogatory Four as to damages and otherwise DENIED.

2. The alternative Motion of defendants for a New Trial is DENIED.

3. Judgment will be entered on the verdict of the Jury as follows:

Actual Losses	$ 728,000
Lost Profits (Pipe)	742,520
Lost Profits (Sheet)	80,000
	$1,550,520
Trebled According to Law	X 3
	$4,651,560

NORMA L. SHAPIRO

J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1846

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and KENNEDY CULVERT
& SUPPLY COMPANY, and
ROBERT KENNEDY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
C. A. No. 74-122

Argued February 22, 1978

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*, and MARKEY, **Chief Judge of the Court of Customs and Patent Appeals.*

Michael M. Baylson, Esq.
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Attorney for Appellant

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William H. Roberts
Samuel R. Simon
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Attorneys for Appellees, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.

ADAMS, *Circuit Judge*

*Sitting by designation.

C. Clark Hodgson, Jr.
Lee A. Rosengard
Stradley, Ronon, Stevens
& Young,
Philadelphia, Pa. 19102

Attorneys for Appellees Robert A. Kennedy and Kennedy Culvert & Supply Company

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OPINION OF THE COURT
(Filed May 24, 1978)

Antitrust litigation seldom partakes of elegant simplicity. Its elaborations find expression both in the intricacies of finely woven legal theory and in the expansiveness of painstakingly detailed factual submissions. In the face of such complexity, considerable value attaches to efforts by the trial judge to confine the task of the jury to manageable dimensions by the judicious use of directed verdicts. Nonetheless, the Seventh Amendment guarantees a party the right to commit the task of determining facts in civil proceedings to a jury. And the difficulties of deciphering the import of extensive and conflicting evidence may not be allowed to disturb the exercise of that right.

In the matter before us, the resolution of charges of antitrust violations in the market for aluminum culvert pipe turns on disputed factual issues of conspiracy, motive, and market definition. The trial judge, however, deemed it appropriate to enter a directed verdict at the close of the plaintiff's case. We are now called upon to determine whether the extensive trial record permitted such an action.

A. Facts

1. *The Parties*

This proceeding arose out of the interaction of five entities: Columbia Metal Culvert Company, Inc. (the plaintiff), Kaiser Aluminum & Sales, Inc. (KACSI), Kaiser Aluminum Chemical Corporation (KACC), Robert Kennedy, and Kennedy Culvert & Supply Company.

The plaintiff in this case originated in 1959, when Joseph Bonjourno founded Columbia Steel, a corporation that was to fabricate metal culvert pipes used in highway construction. Three years later, after some financial difficulties, Columbia was reconstituted as Columbia Metal Culvert, the current plaintiff. Columbia Metal's plant in Vineland, New Jersey, specialized in the manufacture of aluminum culvert pipes, which the company then marketed.

KACC and its wholly owned subsidiary, KACSI, constitute the second alignment in the case. KACC manufactures aluminum sheet and coil, from which aluminum culvert pipe, such as Columbia's product, is constructed; it then conveys these pipes to KACSI, at a "transfer price" which is not necessarily reflective of either costs or market price. KACSI in turn sells the sheet and coil to pipe fabricators such as Columbia. In addition, KACSI fabricates and sells aluminum culvert pipe itself in competition with the fabricators to whom it supplies sheet and coil. KACSI sells 80% of the aluminum culvert pipe in the United States, although only 79% of its pipe output is aluminum (the rest being steel). Neither of the other large aluminum producers manufactures aluminum culvert.

The third set of parties before us is comprised of Kennedy Culvert & Supply Company, a distributor of KACSI culvert pipe in Southern New Jersey, and its owner, Robert Kennedy, a former salesman for Columbia Metal.

2. *Background of Dispute*

In earlier times, the parties had enjoyed a close business relationship. Columbia's decision in 1962 to begin producing aluminum culvert was encouraged by KACC and KACSI, who supplied technical assistance, as well as all of Columbia's raw materials. Columbia was one of the few strictly aluminum culvert manufacturers in the country and KACSI manifested an interest in using Columbia as a spearhead to break into the culvert market — a market which had previously been dominated by steel and concrete products. In these amicable years, Robert Kennedy was one of the most successful of Columbia's salesmen.

The core of Columbia's antitrust claim is that in 1971, when Columbia decided to place some of its aluminum orders with Reynolds Aluminum, KACSI determined to put Columbia out of business in retaliation. After learning of the errant orders, the evidence reveals, KACSI refused to sell aluminum to Columbia.[1] In addition, Columbia alleges that in an act of vengeance for Columbia's infidelity, KACSI decided, with KACC's approval, to locate a new culvert manufacturing plant in New Castle, Delaware, within fifty miles of Columbia's plant in Vineland, New Jersey, despite the fact that KACSI's new production unit had earlier been slated for Virginia. Because of the high cost of transporting culvert, there is evidence that the Delaware location meant that Columbia would become subject to severe new competition from KACSI culvert.

At the same time, Columbia maintains, KACSI conspired with Robert Kennedy, still a Columbia salesman, to set Kennedy up in business as an independent distributor of KACSI products in the Vineland area, and thereby to complete the destruction of Columbia's mar-

1. While the defendants dispute the allegation that KACSI refused to sell to Columbia, there is ample evidence to allow a jury to find that such was KACSI's policy. N.T. 163, 943-44, 2057-59, 2294.

ket. Columbia charges that Kennedy used confidential knowledge he had gained from his work with Columbia to underbid Columbia, and that Kennedy and KACSI conspired to avoid competing with one another.

Finally, Columbia claims that it was the victim of a price squeeze consciously engineered by KACSI and KACC to drive independent fabricators such as Columbia out of business. Sheet and coil were transferred from KACC to KACSI below cost, enabling KACSI to make a "profit" on sales of aluminum pipe at prices too low to be matched by independents who had to buy their sheet and coil at market prices. Simultaneously, it is claimed, KACSI, with KACC's concurrence, contrived to raise the price of raw materials confronting Columbia.

As a result of these maneuvers, Columbia asserts, it was driven out of business.

3. *The Litigation*

In 1974, Columbia brought the present law suit, which charges Kennedy, KACSI, and KACC with violations of §§1 and 2 of the Sherman Act. In addition, the complaint alleges that KACSI is guilty of an infraction of §3 of the Clayton Act by its attempt to insist that Columbia deal exclusively with KACSI for coil and sheet.

After the jury had heard the twelve days of testimony comprising the plaintiff's case, the trial judge directed a verdict for the defendants on all of Columbia's claims. Judge Cahn held:

> 1. The evidence "tended to establish" that the relevant market in the case was not, as Columbia contended, a market for aluminum culvert, of which KACSI controlled 80%, but a market for both steel and aluminum culvert, where KACSI sales represented less than 10%.[2]

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2. Since this was a motion for a directed verdict after the plaintiff's case was completed, we understand that Judge Cahn ascertained that a jury could not have reasonably determined that the market in question consisted solely of aluminum culvert.

2. As a result, KACC/KACSI could not be guilty of monopolization in violation of §2 of the Sherman Act since they possessed no monopoly power in the relevant market.

3. Neither could KACC/KACSI be guilty of attempted monopolization since the limited market position precluded a "dangerous probability of success."

4. KACC, KACSI and Kennedy could not be liable for conspiracy to monopolize, on the ground that insufficient evidence had been adduced for a jury to find either specific intent to monopolize or a conspiracy to monopolize in the relevant product market.

5. A jury could not find KACC and KACSI guilty of a conspiracy or combination in restraint of trade under §1 of the Sherman Act, since not enough evidence had been presented to allow a reasonable inference or conspiracy between KACSI and KACC, and because the market share was too small to allow a finding of restraint of trade.

6. Kennedy and KACSI could not be held liable for conspiracy in restraint of trade because there was inadequate evidence to allow a jury to find a conspiracy between Kennedy and KACSI, a substantial restraint of trade, or an intent to put Columbia out of business.

7. The failure to present evidence on the proper definition of the market for the Clayton Act claim precluded a finding in plaintiff's favor on that issue.

Columbia has appealed each aspect of the directed verdict.

B. Standard of Review

As the trial judge recognized, in evaluating defe

dants' motion for a directed verdict, the question is whether sufficient evidence has been introduced, when viewed in the light most favorable to the plaintiff and allowing all reasonable inferences in its behalf, to allow a jury to find that relief is warranted.[3]

The badinage between the plaintiff and defendants in this case over whether "some" evidence, "substantial" evidence, "any" evidence or a "scintilla" of evidence is necessary in order to defeat a motion for directed verdict impels us to reiterate the Supreme Court's comments of 35 years ago in *Galloway v. United States*:[4]

> Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence" or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

Where the issues are ones for resolution by the jury, the judge may deprive the jury of its role at trial only where such action is necessary to guard against a verdict founded solely on "mere speculation."

C. The Market

The fulcrum of the district court's opinion was its determination that no jury could reasonably find the relevant market in this case to be composed of any spectrum of products more restricted than "aluminum cul-

3. *See Patzig v. O'Neill*, typescript p. 4-5, (No. 77-1190, 3d Cir. 1978); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n. 6 (1962).

4. 319 U.S. 372, 395 (1943).

vert and steel culvert." This determination reduced the market position of the defendants, as proved at trial, from over 80% of the aluminum market to less than 10% of the aluminum and steel market.[5] Such a reduction in market share allowed the trial judge to proceed to draw the conclusions that the case contains no adequate evidence to allow the jury to find monopolization, dangerous probability of monopolization, or restraint of trade. The correctness of the district judge's market determination, therefore, must frame the analysis of the charges brought by Columbia.

1. *The Mode of Market Definitions*

Well-settled principles govern the delineation of the relevant product market in an antitrust case, even if the outcome of their application to individual fact patterns is often less than obvious.

The "monopoly" condemned by §2 of the Sherman Act[6] inheres in "the power to control prices or exclude

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5. The defendants claim that even if the plaintiff's market definition is accepted, no competent testimony in the record establishes the proportion of aluminum culvert manufactured by KACSI in the agreed upon five state geographical market. Since the unrefuted testimony of Mr. Bonjuorno, who traded extensively in the geographical market, asserts that the KACSI market share is "around 80%," and since that figure accords with KACSI/KACC's admitted 80% share of the aluminum culvert market nationwide, there is sufficient evidence in the record on this point to defeat a motion for directed verdict.

Similarly, while we can find no evidence establishing KACSI's proportion of the steel and aluminum market, both counsel agreed at oral argument that the figure was less than 10%.

6. 15 U.S.C. §2 proscribes the actions of:

> Every person who shall monopolize or attempt to monopolize, or conspire, or conspire with any other person or persons to monopolize any part of trade or commerce among the several states.

competition."[7] To the extent that competition from related products limits the market power of an entity with a dominant position in one product, such an entity is less likely to be found to hold "monopoly" power forbidden by law. This is so for the ongoing competition from other products guards against the ability of the dominant entity to increase prices and makes exclusionary tactics by such a party fruitless, impossible or unbearably expensive. Thus in resolving the proportion of the "market" controlled as a prelude to an examination of the extent of a firm's power to control prices or exclude competition, the courts look to the range of "commodities reasonably interchangeable by consumers for the same purposes."[8]

Similarly, in the context of §1's prohibition of conspiracies in restraint of trade, except where practices fall under a judicially crafted *per se* ban, a finding of illegality presupposes a determination in any given case that the "effect upon competition in the marketplace is substantially adverse."[9] This inquiry, in turn, necessitates an examination of the boundaries of real competition. As the Supreme Court stated in *Times-Picayune Publishing Co. v. United States* "our inquiry to determine reasonableness under §1 must focus on 'the percentage of

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7. *United States v. E. I. duPont & Co.*, 351 U.S. 377, 391 (1956) *quoted in United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

8. *United States v. DuPont*, *supra*, 351 U.S. at 395.

9. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1346 (3d Cir. 1975), *quoting United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967). *See Sitkin Smelting & Refining* typescript at 13. (No. 77-1003/4, 3d Cir. 1978). Even in some classes of cases which fall within the "per se" rule market power is relevant to a finding of violation. *See e.g. United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 619-22 (1977) (tying requires market power); *Continental TV Inc. v. GTE Sylvania* 433 U.S. 36, 65-66 (1977) (White, J. concurring).

business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.' "[10]

Therefore, under either §1 or §2 of the Sherman Act, judges must attempt to ascertain the flow of commercial interactions. And in exploring this pattern of competition, courts are adjured to follow the well-trodden trail illuminated by the late Chief Justice Warren in *Brown Shoe Co., Inc. v. United States:*[11]

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10. 345 U.S. 594, 615 (1953). *See id.* at 612 n. 31 ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variation in price, only a limited number of buyers will turn . . .); *Coleman Motor supra, American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1247 (3d Cir. 1975).

11. 370 U.S. 294, 325 (1962). *Brown Shoe* was a §7 case, but its submarket analysis was adopted in a §2 context in *United States v. Grinnell Corp.* 384 U.S. 563, 572 (1966).

As we have intimated in prior cases, the inquiries into the scope of competition under §1 and §2 are not precisely the same. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347-48, 1349 (3d Cir. 1975) (market definition sufficient for §1, not §2); *Glauser Dodge Co. v. Chrysler Corp.*, No. 76-2390/77-1188 (3d Cir. 1977) slip op. at 17 n. 17, *cert. denied* May 22, 1978 (distinguishing §1 market definition from §2 market). *See Fount Wip v. Reddi Wip Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978) (§1 verdict affirmed, §2 verdict reversed on failure to prove market adequately), *cf. United States v. E. I. DuPont & Co.*, 351 U.S. 377, 395 n. 23 (1956) (distinguishing between monopolization, attempt to monopolize and conspiracy to monopolize with regard to market definition). The §2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. §1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable. Thus, rival products might provide sufficient competition to foreclose a finding of monopolization, yet the degree of insularity of the initial product might allow a finding of illegal restraint of trade in regard to restrictions imposed within that initial market. For instance, stifling intrabrand competition may violate §1, while "monopoly" over a given brand would clearly not run afoul of §2. *See Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36, 52 n. 19, 53, 59 (1977).

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

That path, however, has led to a variety of destinations. It is true, as the defendants here point out, that the Supreme Court in *DuPont*, a §2 controversy, refused to treat "cellophane" as a product market distinct from other flexible wrapping paper.[12] Yet, in subsequent cases, the Court has countenanced the separation of "accredited central station alarm systems" from non-accredited alarms, noncentral station alarms, and watchman services;[13] the distinction between markets for insulated aluminum and insulated copper wire, despite the fact that the same customers bought each for similar purposes;[14] and the differentiation between championship boxing matches and all other boxing matches.[15] Thus, the breadth of the spectrum of prod-

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12. *United States v. E.I. duPont & Co.*, 351 U.S. 377 (1956).

13. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966).

14. *United States v. Alcoa (Rome)*, 377 U.S. 271 (1964).

15. *United States v. International Boxing Club of N.Y. Inc.*, 358 U.S. 242 (1959).

In relying upon *United States v. Continental Can*, 378 U.S. 441 (1964), as an example of the impropriety of treating competing products as separate markets, the district court appears to have misinterpreted that case. The court in *Continental Can* held that for antitrust purposes that "meaningful competition" between glass

ucts which have been held to constitute "markets" for antitrust purposes bears out the Supreme Court's observation in *United States v. Continental Can* that:

> [T]he [legal] guidelines offer no precise formula for judgment, and they necessitate rather than avoid, careful consideration based on the entire record.[16]

As this Court recently indicated, a pronouncement as to market definition is not one of law, but of fact, and as such, a party in a private action may allocate it to the jury.[17] Meticulous "color-matching"[18] of precedent to determine how similar a particular product is to others which have or have not constituted markets in other cases is thus not nearly so important as a detailed examination of the record developed in the trial court.[19]

Note — *(Continued)*

and metal containers implied that a relevant market could be constructed of those two product lines. The Supreme Court carefully elaborated, however, that "Glass and metal containers were recognized to be two separate lines of commerce." *Id.* at 456. Moreover, "that there is a broader market made up of glass metal and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic, or cans and glass together, for 'within this broad market, well defined supermarkets may exist which, in themselves, constitute product markets for antitrust purposes.' " *Id.* at 458.

16. 378 U.S. at 449.

17. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1349 (3d Cir. 1975).

18. *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

19. It is for this reason that the defendants' reliance on *United States v. Amsted Industries, Inc.*, CCH 1974-2 Trade Case ¶75, 208 (N.D. Ill. 1974) and *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 and 259 F. Supp. 440 (E.D. Pa. 1966) (Van Dusen, J.), which refused to find supermarkets composed of particular varieties of pipes, is misplaced. The evidence submitted to the finders of fact in those situations clearly differed from the record in the case before us, which involves a wholly different set of litigants. We also note that *Amsted* was decided after a full trial rather than on a motion for a directed verdict.

2. *The Market as Presented at Trial*

According to the evidence here, culvert pipe is used primarily in large construction projects, such as housing developments and highways, to provide channels for draining surface water. Three types of culvert pipe are manufactured: steel, concrete, and aluminum. There was testimony from a number of witnesses that since all three materials have different physical properties, with rare exceptions specifications for construction projects call for only one type of culvert.[20] As a result, on most occasions — once the engineering specifications for the project have been fixed — the contractor who actually purchases culvert pipe may choose only among different manufacturers of the same material. From the contractor's point of view, there could reasonably be said to exist distinct markets for aluminum, for steel and for concrete pipes. Consequently, if he avoided exceeding the price necessary to induce engineers not to specify aluminum, a monopolist in aluminum culvert might well be able to raise prices without fearing encroachment on his sales from other products.

Nor would a jury have acted unreasonably in finding, on the basis of the record here, that the patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market. For there was testimony that *price was not the crucial variable in the choice* by engineers among the materials used to drain surface water. Roy Elam, a former city engineer who qualified as an expert witness, testified that in his experience "cost is checked out at

20. N.T. 36 (Joseph Bonjourno, president of Columbia); N.T. 1272-73 (Roy Elam, former county engineer); N.T. 1282 (Don Spoltore, contractor). Carlos Chaffin, of Reynolds Aluminum, however, testified that specifications generally called for aluminum and steel as alternatives.

Since we deal here with a directed verdict, of course, we must resolve conflicts in testimony in favor of the plaintiff. In view of this standard we are somewhat puzzled by the district court's assertion that "in many instances" both aluminum and steel pipe were specified. (36a).

the end of the design," and "budget numbers are not influenced much" by the cost differentials between concrete, aluminum and steel.[21] He also indicated that the choice among the materials was made primarily on the basis of their physical properties, rather than price.[22]

Credible testimony was produced to show that there is *considerable difference among the physical properties of concrete, aluminum and steel:* Concrete is stronger than steel, which in turn is stronger than aluminum. Concrete culverts, being smooth, conduct water better than steel or aluminum culverts, which are made out of corrugated metal. But steel and aluminum are easier to work with.[23] Further, steel generally is stronger than aluminum. Because of this, and because it has been in the market longer, steel is more widely used than aluminum. The State of New Jersey and the Federal government on occasion specify steel, but forbid aluminum.[24] There was also testimony, however, that aluminum resists corrosion better than steel and is more durable, particularly in salt-water regions. As a result, Elam asserted, aluminum is used to the exclusion of steel "along the shore."[25] Aluminum is also lighter than steel, and

21. N.T. 1202.

22. *Id.* N.T. 1216. *See Smith Kline Corp. v. Eli Lilly & Co.*, type script at p. 14, No. 77-1232 (3d Cir. 1978) (Market definition must take into account the fact that physicians, who regulate use of drugs are not cost-conscious. Therefore, despite overlap in capabilities, drug with unique features constitutes separate market). There is also evidence that the New Jersey Highway Department takes the position that physical capabilities of culvert rather than cost should be the deciding factor. N.T. 1216.

23. N.T. 1159, 1185; 1212-1220 (Elam).

24. N.T. 676 (Bonjourno).

25. N.T. 1219. *See* N.T. 676 (Bonjourno: customer "would only accept aluminum" in salt water environment); N.T. 886 (Buchy, of KACSI: better acceptance around salt water environment); N.T. 1549 (Arvay, manufacturer: aluminum's longer life in salt-water environment makes it desirable).

thus is preferred in marshy areas, where access for heavy equipment would be difficult.[26]

In sum, Elam stated that, as to engineering properties, there was "no way you could say these three [types of culvert] are interchangeable,"[27] and that the materials "were not in competition from an engineering standpoint."[28]

Thus, *there is evidence from which the jury could reasonably have concluded, as did Mr. Elam, that aluminum is recognized by customers as a "specialty material used only in special applications."*[29] Aluminum culvert could therefore have been found by the jury to constitute a separate submarket.[30]

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26. N.T. 1220 (Elam). *See* N.T. 676, (Bonjourno).

27. N.T. 1158-59.

28. N.T. 1267-69. Chaffin, of Reynolds stated that the products were "not completely interchangeable," though they were "interchangeable." N.T. 2101. *Cf.* N.T. 1385 (Schamberg, salesman: "no competition because engineers feel very strongly about their products").

29. N.T. 1221, 1226. *See* N.T. 1549 (Arvay, aluminum manufacturer: "aluminum is a very specialized product").

30. Evidence on most other indicia of submarket existence *was equivocal*, but *could reasonably be understood to support plaintiff's position*.

No figures were presented on cross-elasticity of demand. On one hand Collins testified that "it is possible" that Bonjourno had said that he lost business as a result of lower concrete prices. N.T. 1653. And the statement that price levels of sheet aluminum and sheet steel were related (Chaffin N.T. 2114) could be taken to imply that consumers switched back and forth in response to price between the two varieties of culvert, allowing manufacturers to purchase whichever sheet was cheaper. On the other hand, Elam testified that despite the great increase in concrete and steel prices, he gave no consideration to substituting aluminum for concrete. N.T. 1212. And the rough studies introduced at trial showed little sensitivity of aluminum culvert prices to price changes of other culvert types.

The defendants point to testimony by producers of aluminum culvert pipe, including the plaintiff's president, which makes reference to "competition" between aluminum and steel manufacturers in attempting to have their respective products specified by engineers, as well as statements by KACSI and Reynolds employees that prices of aluminum culvert are set with reference to steel.[31]

Although such testimony is surely not irrelevant to the definition of a market, neither is it determinative in the context of this case. First, it is not the perceptions of manufacturers but those of consumers which are most salient in the determination of market boundaries.[32] More important, the existence of competition between two product lines does not alone preclude market power within each line, if each product has a cadre of customers in which it enjoys a decisive advantage. For example, in *United States v. Grinnell*,[33] the Supreme Court ac-

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Note — *(Continued)*

It is true there was testimony that the same production facilities can be used to turn out both steel and aluminum culvert, and that the same companies often manufacture both. This, however, is not enough to preclude the existence of submarkets as a matter of law. *Compare Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962) (mens, womens, childrens shoes are separate submarkets) with *Id.*, 367 (Harlan, J. dissenting) (plants may be shifted between production of the three types of shoes).

31. *E.g.* N.T. 192, 189, 616, 571-72 (Bonjourno); N.T. 2336, 2338-39 (Collins, KACSI); N.T. 1977 (Melrose, Reynolds employee). *But see* N.T. 564-66 (Bonjourno: did not compete often with steel).

32. *See* e.g. *Smith Kline Corp. v. Eli Lilly & Co.*, CCH Trade Cas. 1976-2 ¶ 61, 199 at p. 70,460 (E.D. Pa. 1976) (Higginbotham, J.) affirmed No. 77-1232 (3d Cir. 1978); *Beatrice Foods, Inc. v. FTC*, 540 F.2d 203 (1st Cir. 1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 551 (1st Cir. 1974) *cert. denied* 421 U.S. 1004 (1975).

33. 384 U.S. 563 (1966).

knowledged competition between the defendants' "central station alarm" system and other protective devices. Indeed said the Court:

> We recognize that (as the district court found) [the defendants] do not have unfettered power to control the price of their services . . . due to the fringe competition of other alarm or watchman services.[34]

Nonetheless, the Court held that the central station services constituted a separate market, since "some customers will . . . be unwilling to consider anything but central station protection."[35] From the evidence presented, it would not have been unreasonable for the jury here to have made a similar finding. Accordingly, we must reject the trial judge's conclusion that the evidence "establishes that aluminum culvert pipe is not a separate submarket from steel culvert pipe."[36] Inasmuch as there was sufficient evidence to go to the jury on this central question, we treat the market, at least for purposes of this appeal, as composed of aluminum culvert pipe.

D. *Monopolization*

The directed verdict against the plaintiffs on the claims that the defendants monopolized, attempted to monopolize, and conspired to monopolize in violation of

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34. *Id.* at 574.

35. *Id.* Also instructive is *United States v. Alcoa* (Rome) 377 U.S. 271, 275 (1964), where the Supreme Court said:

> Admittedly there is competition between insulated aluminum conductor and its copper counterpart, as the district court found. Thus, in 1959, insulated copper conductor composed 22.8% of the gross additions to insulated overhead distribution lies. . . . Yet, we conclude that the degree of competitiveness does not preclude the division [of aluminum from copper] for purposes of §7 into separate submarkets.

36. District court's opinion p. 6.

§2 was based on the trial judge's prior conclusion that steel and aluminum, rather than aluminum culvert pipe alone, constituted the relevant market. Based on the small percentage of the steel and aluminum market which the defendants represented, the trial judge held that there was insufficient evidence to allow a jury to find monopolization, the probability of success necessary for attempted monopolization,[37] or the specific intent prerequisite to liability on a conspiracy to monopolize.

Since we hold that a conclusion that aluminum culvert pipe constituted a relevant market was not unreasonable, the foundation of the directed verdicts on the §2 counts collapses.

There was sufficient evidence from which the jury could have inferred that KACSI attempted to drive Columbia out of business. Holmes Collins, the manager of KACSI's highway division, was heard to say that if Columbia bought metal from Reynolds he, Collins, would locate an aluminum culvert plant in Columbia's "backyard."[38] This was relevant because transportation

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37. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1330, 1348 n. 17 (3d Cir. 1975), we declined to follow the Ninth Circuit's rule that it is possible to find an "attempt to monopolize" a "part of commerce" in violation of §2 without first determining the share of the relevant market controlled by the defendant. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964); *Greyhound Computer Corp. v. International Business Machines*, 559 F.2d 488, 504 (9th Cir. 1977) (and cases cited therein). Instead, "at least in a case such as this," we utilized the criterion of *Swift & Co. v. United*, 196 U.S. 375 (1905), which required sufficient market power to come dangerously close to success. *Coleman Motor Co. supra*, at 1348. *See Rea v. Ford Motor Co.*, 497 F.2d 577, 590 n. 28 (3d Cir. 1975); *but cf. United States v. E. I. DuPont & Co.*, 351 U.S. 377, 395 n. 23 (1956) (distinguishing market inquiry relevant to monopolization from that relevant to attempts or conspiracies to monopolize; commenting that where allegations of conspiracy and combination to monopolize are present, "the scope of the market was not in issue").

38. N.T. 858.

of culvert is a significant item of expense for the product in question, and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery.[39] In fact, Collins did so locate a plant, despite the fact that there was evidence that his original plans called for a Virginia situs.[40]

Moreover, the jury could have found that Collins extended credit to Kennedy, a competitor of Columbia, against the recommendations of the KACSI credit department,[41] thus showing that KACSI engaged in conduct against its business interest in order to damage the plaintiff.

More generally, there was evidence that KACC transferred sheet and coil to KACSI at accounting prices that were less than production cost and well below market price, enabling KACSI to sell pipe more cheaply than independent fabricators could manage.[42] While this may not be a classic predatory pricing endeavor, it effectively allowed KACSI to drive independents out of the market. Finally, the prices at which the Delaware KACSI plant

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39. N.T. 1299, 1316 (Spoltore, contractor).

40. N.T. 2002, 2012. *Compare Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948), where the Supreme Court upheld an inference of unlawful purpose violative of §§1 and 2 from the finding that "Schine made threats to build theaters or to open closed ones in order to force sales of theatres in various towns or to prevent entry by an independent operator."

41. Exhibit P-75 (reproduced at 439a-441a) (memo from credit department finding "no basis for taking on" the credit exposure necessary to allow Kennedy to operate, noting necessity to provide "long term financial assistance"); Exhibit P-24 (reproduced at 438a) (unsigned Kaiser memo noting that for Kennedy to succeed, Kaiser must "maintain his profit margin" in the face of increased competition). *See* Exhibit P-5, (letter from Collins to Kennedy stating Collins' intention to "make Kennedy a success").

42. N.T. 2407-9, 2450-52, 2433-35, 2448-49 (C. E. Parker, KACC official, stating that "transfer prices" were lowered to below manufacturing cost, even excluding depreciation; KACSI profit was calculated using "transfer prices" as cost of materials).

sold culvert were lower than those KACSI charged at certain other plants, despite the fact that costs in Delaware were no lower — giving rise to a permissible inference that prices were depressed in an effort to harm Columbia.[43]

From the testimony and from KACSI's actions against its business interests, the jury could have inferred that KACSI intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between KACSI and Columbia, the jury might well have inferred that KACSI knew of the drastic impact its maneuvers would have on Columbia's prospects for survival. Such activities, engaged in by an entity controlling more than 80% of the market, would be sufficient to allow the jury to find both the anticompetitive effects and intent requisite to liability for monopolization or attempted monopolization.

Accordingly we reverse the directed verdict as to defendants KACSI and KACC on the §2 counts.[44]

E. Conspiracy in Restraint of Trade

By its terms, §1 of the Sherman Act proscribes "every combination . . . or conspiracy in restraint of trade."

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43. N.T. 2336-2339.

The testimony of Mr. Arvay, an independent aluminum culvert fabricator operating in the southern part of the United States, is also supportive of the plaintiff's theory. Arvay stated that after he "refused point blank" to purchase his raw materials exclusively from Kaiser, Kaiser began to compete in his area, where they had not previously been active. N.T. 1533. His perception of the competition matched the "price squeeze" alleged by the plaintiff here: Kaiser marketed finished pipe a fraction of a cent above the price Arvay paid for raw materials. N.T. 1533-41.

44. The trial judge held in the alternative that insufficient evidence had been adduced to support a jury finding of conspiracy. Since we hold *infra* that such a conclusion is accurate as to Kennedy and Kennedy Culvert, we affirm the verdict as to those defendants.

Liability under that section obviously requires a finding of a combination or conspiracy. In addition, under well-worn judicial interpretation, a finding of a §1 violation entails a determination that such conspiracy or combination *unreasonably* restrains trade.[45] The trial judge here supported his decision to grant a directed verdict on the §1 charge both on the ground that there was insufficient evidence from which a jury could have found a combination or conspiracy, and on the basis that the evidence could not as a matter of law support a finding that whatever conspiracy allegedly existed unreasonably restrained trade.

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45. The doctrinal template which continues to mold the rule of decision for modern cases is the articulation of Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Quoted in, e.g. Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n. 15 (1977); *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 18; *American Motor Inns Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246 (3d Cir. 1975).

As a further refinement, in certain classes of cases, "agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958) *quoted GTE Sylvania supra* 433 U.S. at 50.

The second rationale is untenable in light of our conclusion that the jury could have found that aluminum culvert is a relevant market. If the jury ascertained that KACSI, which controlled 80% of the aluminum culvert market, conspired to drive one of its few competitors (Columbia) out of business, such a conspiracy could have been found by the jury to violate §1. Since, as we have noted previously,[46] the presence of independent producers in an oligopolistic market serves to limit the market power of the dominant firms, the departure of an independent producer in such a situation adversely affects competition. Where such an elimination is consciously brought about by concerted action to which a dominant entity is a party, at least in the absence of a compelling business justification for such actions, an unreasonable restraint of trade may be found to exist.[47]

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46. *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 20, *cert. denied* May 22, 1978; *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975); *see* N.T. 1848-1853 (Prof. Williamson, an economist, testifying as an expert witness, elaborated the adverse effects on competition resulting from driving independents out of business through use of a price squeeze).

47. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975); *American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1248 (3d Cir. 1975); *Fount Wip v. Reddi Wip, Inc.* 568 F.2d 1296 (9th Cir. 1978); *Taxi Weekly v. Metropolitan Taxicab Board of Trade*, 539 F.2d 907 (2d Cir. 1976).

Since there is sufficient evidence here for a jury to find that KACSI controls 80% of the relevant market, we need not decide the question of whether a conspiracy to eliminate a competitor would be a violation of § 1 in the absence of such a market position on the part of one of the conspirators. We note, however, that we have previously stated: "A contract, regardless of actual effect, contravenes the Act if it was intended as part of a scheme to . . . drive a competitor out of the market." *American Motors Inns, Inc. v. Holiday Inns*, 521 F.2d 1230, 1248 (3d Cir. 1975). *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975) ("a combination of distributors which through unfair practices eliminates a competitor and leaves it in such a condition that it lacks the ability to continue business . . . has an adverse effect on the market place");

Thus the issue as to the §1 violation is whether the trial judge's alternative ground for decision is viable: that there was inadequate evidence to allow the jury to find a conspiracy involving KACSI to put Columbia out of business.

As observed above, there was evidence which could have permitted a jury to infer that KACSI acted with an intent to drive its competitor, Columbia, out of business. The propriety of the directed verdict thus turns on whether, with regard to KACSI and any other defendant,

> . . . the circumstances are such as to warrant [the trier of fact] in finding that the [alleged] conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.[48]

Consequently, we now turn to examine separately the

Oreck v. Whirlpool, 563 F.2d 54, 58 (2d Cir. 1977) (plaintiff required to show either anticompetitive effect on industry as a whole, or that restriction was designed to drive it out of business) (dictum); *Fount Wip, supra*, (holding that attempt to drive firm out of business violates § 1, even where market is not sufficiently defined to allow finding of § 2 violation).

The position is not without support in Supreme Court decisions. *E.g. United States v. General Motors*, 384 U.S. 127, 146 (1966) ("exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins"); *Poller v. Columbia Broadcasting Syst.*, 368 U.S. 464, 468-73 (1962) (attempt to drive independent station out of business by television network makes out § 1 violation even though network's position in market served by television station was limited); *see, e.g. Ramsey v. UMW*, 401 U.S. 302, 304-05 (1971) (alleged conspiracy to drive small coal operators out of business); *First National v. Cities Services*, 391 U.S. 253, 284-86 (1968) (alleged conspiracy to drive independent oil producer out of business)

48. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) *quoting American Motor Inns Inc. v. Holiday Inns Inc.*, 521 F.2d 1230, 1243, *quoting American Tobacco Co. v. United States*, 781, 810 (1946).

two groupings which, according to Columbia, harbor such common unlawful purposes.

1. *The Alleged KACSI/KACC Conspiracy*

The first combination alleged to violate § 1 arises out of the joint activities of KACC and KACSI. KACSI is a wholly-owned subsidiary of KACC, sharing joint management on several levels of operation. Because of this, KACSI and KACC suggest that they are incapable of conspiring together. Though legally distinct for most purposes, defendants argue, the reality of the corporate structure of KACC and KACSI negatives the plurality of actors legally necessary to form an illegal conspiracy.

This argument is not well-founded in law, for the prerequisites of a conspiracy under § 1 are fulfilled by the presence of two or more legally distinct corporations. Indeed, we recently had occasion to reject a contention of legal inability to conspire with regard to subsidiaries which were "part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles." The claim that such corporation could not form a § 1 conspiracy, we held, was foreclosed by a line of cases in this Court reaffirming the viability of the "intra-enterprise conspiracy" theory as applied to separately incorporated entities.[49]

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49. *Glauser Dodge v. Chrysler Corp.*, No. 76-2390, 77-1188 (3d Cir. 1977) slip op. p. 16, *cert. denied* May 22, 1978. *See Cromar Co. v. Nuclear Materials Equip. Corp.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *Brayman v. Bassett Furniture Co.*, 552 F.2d 90, 101 n. 32 (3d Cir. 1977).

The defendants rely on *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972), for the proposition that a parent and subsidiary which are "in reality" the same corporation, cannot conspire. However, in *Cromar*, n. 18, we characterized the language upon which the defendants now rely as dictum.

Next, the defendants point to *Sunkist Growers Inc. v. Winckler & Smith Citrus Products*, 370 U.S. 19 (1962). But that case also offers scant support for an attack on the intra-enterprise conspiracy

Judge Cahn's holding that there was insufficient evidence to go to the jury on the existence of a KACC/KACSI conspiracy was grounded on a different rationale. The trial judge pursued the opposite approach from the defendants' argument of "functional identity;" while he commented that he harbored doubts as to the

doctrine. *Sunkist* held only that the policy behind the Capper-Volstead Act required that two affiliated subsidiaries of a fruit marketing organization be treated as exempt agricultural organizations. Indeed, in *Case Swayne Co. v. Sunkist Growers*, 389 U.S. 384, (1967) the Court held that successors to the subsidiaries exonerated in *Sunkist I* were not exempt when their activities included processing by middle-men.

Rather, the Supreme Court has made clear that the choice to adopt dual corporate form subjects businesses to the strictures of the antitrust laws. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Schine Chain Theaters Inc. v. United States*, 334 U.S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 2[illegible] (1947). The attempt of the student author of Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman act: A Suggested Standard* 75U. Mich. L. Rev. 717, [illegible] the Supreme Court cases as applying only to distinct economic entities is unconvincing, particularly in view of its failure to deal with *Schine Chain*.

If limitations on the intra-enterprise corporate conspiracy doctrine are necessary, it seems to us that a more appropriate standard and one more consistent with the cases is that articulated by Professor Sullivan:

> "Concerted action" by two "legal persons" which is limited solely to the internal management of a single fim does not restrain competition; but "concerted action" by two "legal persons" which erects barriers to entry by another separate firm . . . can be a restraint of trade. . . . [But] at some point, a diminished level of business integration between two related corporations will warrant a conclusion that they are two firms even though there are some elements of common ownership and control.

Sullivan, Law of Antitrust, 328 (1977).

See Report of Attorney General's National Committee to Study the Antitrust Laws 34 (1955) (no violation occurs if the "conspiracy" restrains no trade other than that of the parent and its subsidiaries").

capacity of KACSI and KACC to conspire, Judget Cahn held that rather than being too closely aligned to constitute a conspiracy, KACSI and KACC were not closely enough related. He determined that threre was inadequate evidence to allow a jury to find that the two entities shared the requisite unity of purpose. We disagree with this evaluation.

Some of the efforts which allegedly engineered Columbia's elimination were concededly undertaken by KACSI alone. However, the jury could have found that the combined efforts of KACC and KACSI were utilized (1) to impose the price squeeze and (2) to open the New Castle plant.

In finding that prices for sheet and pipe were arrived at by Holmes Collins, KACSI's division manager, independently of KACC, and thus that KACC was not implicated by the price squeeze, Judge Cahn relied on the testimony of Collins as evoked by the defendants on cross-examination. Were this a finding of fact, and a judgment of credibility, such reliance could not be reversed. However, the defendants' motion was one for directed verdict, and Collins' testimony had been contradicted.

Collins himself stated elsewhere in his testimony that he had no part in setting the "specification price" of coil.[50] This casts doubt on his later assertion that the responsibility for setting all prices was solely his. Moreover, in a memorandum to his subordinates, which was admitted into evidence, Collins noted that he "had been chastised for not getting our prices up high enough."[51] Since there was testimony that Collins, as manager of

50. N.T. 2332. Depending on market conditions, KACSI sold metal at either a "specification price" or a lower "commodity price" to some users. The withdrawal of the lower "commodity price" to culvert manufacturers is alleged to have been a factor in Columbia's demise.

51. Exhibit P- 950.

the Highway Products Division of KACSI, reported to the Sheet and Plate Division of KACC,[52] the jury could have inferred that the pricing policies of KACSI were not independent as Collins claimed at trial, but rather arrived at jointly with KACC. Likewise, another KACSI employee, David Thomas, stated that "someone higher up than Mr. Collins" was responsible for a crucial price increase.[53] Again, the jury could reasonably have concluded from such testimony that pricing responsibility was shared with KACC.

Finally, and quite significantly, the keystone of the alleged price squeeze was the price at which KACC transferred coil and sheet to KACSI. So long as the transfer occurred at a price below cost, the predatory effect could be obained if KACSI kept a sufficient and constant profit margin. Since KACC set the transfer price at a low level, apparently against its business interests, the jury could reasonably have found participation by KACC in the price squeeze.[54]

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52. N.T. 2409.

53. N.T. 1456-59

54. Compare *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977):

> The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express can be inferred, but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action . . . . We recently articulated those circumstances in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 [1314] (3d Cir. 1975):
>
> > (1) a showing of acts by the defendants in contradiction of their own economic interests . . . and
> >
> > (2) satisfactory demonstration of a motivation to enter an agreement.

See First Nat. Bank v. Cities Services, 391 U.S. 153, 184-88 (1968) (intent may be inferred from concerted action where interests of victim and predators conflict, and concerted action would work to the benefit of predators).

In regard to the placement of the New Castle plant, it appears that KACC's approval of Collins "Request for Investment" was a precondition to his constructing the plant. From this involvement, along with the pricing policy, the close relationship between the companies, and the incentive for both KACC and KACSI to keep control of the market, it would not have been unreasonable for the jury to infer a conspiracy between KACC and KACSI to drive Columbia out of business.

2. *Alleged Kennedy/KACSI Conspiracy*

In contrast to the broad-ranging activities of KACC and KACSI, Kennedy's role in the scenario of Columbia's demise was a limited one. Kennedy left Columbia and opened his own business in competition with his former employer.[55] On its face, such conduct seems pro-

55. The plaintiff refers to three other types of evidence to support their claim of a Kennedy-Kaiser conspiracy. First, Columbia has adduced testimony which could be understood to indicate that (a) Kennedy used confidential information he had obtained as a Columbia employee in formulating his own bid in Camden County; and (b) Kennedy solicited one Villari as a customer for Kaiser while still employed by Columbia. While such actions, if established might constitute actionable torts and would probably breach a duty of loyalty, their effect on Columbia's economic viability was neither shown to be substantial nor long-lasting. And the fact that Kennedy breached a duty of loyalty on two occasions does little to prove that he shared in Kaiser's anti-competitive design.

Second, Columbia points to what it refers to as the "clandestine meetings" between Kennedy and KACSI regarding the establishment of Kennedy's business while Kennedy was in Columbia's service. In view of the fact that Kennedy had not agreed to a covenant not to compete with Columbia, such meetings establish only that Kennedy "conspired" with KACSI to start his own business — hardly an anti-competitive act — not that he shared KACSI's anti-competitive purpose.

Finally, Columbia notes the fact that KACSI and Kennedy Culvert representatives were heard to comment at a bid that they had "gotten their wires crossed." Even if the comment was not, as KACSI claims, a jest, such hearsay repetition of an isolated remark without more is too weak a foundation upon which to build a structure of antitrust liability.

competitive, although perhaps demonstrating less than punctilious faithfulness to Columbia, for it created a new competitive entity. And Bonjourno, president of Columbia, testified that two months before Kennedy left, Bonjourno, in the course of a dispute over Kennedy's salary, told Kennedy that Kennedy could "look around" in Southern New Jersey to see whether he could improve his remuneration.[56] Moreover, Bonjourno reiterated that there were no contractual impediments to Kennedy's leaving Columbia for other employment.[57]

Certainly Kennedy's actions could not be characterized as being against his economic interest. In the four years he was employed by Columbia, Kennedy's sales of pipe rose to $300,000 per year, making Kennedy Columbia's best salesman.[58] Nonetheless, Kennedy's salary increased only from $200 to $325 per week.[59] Nor is there any testimony that Kennedy was attempting to destroy Columbia. A finding that Kennedy consciously shared KACSI's anti-competitive purposes would thus be mere conjecture.

Likewise, the relationship between Kennedy and KACSI was not such as to give rise to a reasonable inference that Kennedy was aware of KACSI's strategy and knowingly associated himself with it. While it is true, as plaintiff maintains, that certain testimony can be taken to imply that KACSI gave Kennedy favored treatment, the record is devoid of evidence that Kennedy was privy to KACSI's broader machinations. And a jury could not have reasonably found that Kennedy knew that the probable effect of KACSI's actions would be to eliminate Columbia. The record is barren of testimony that Kennedy was aware either of Coumbia's production costs, or

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56. N.T. 374-75.

57. N.T. 375-78.

58. N.T. 346.

59. *Id.* there is also testimony that Kennedy was subjected to increased financial pressures between 1968 and 1972 due to the birth of his seventh, eighth, ninth and tenth children. N.T. 343-44, 347-78.

of the price at which it bought metal. Absent this information, Kennedy could not know that the competitive pressure his entrance into the market evoked would prove fatal to Columbia.[60]

Inasmuch as we agree with the district court that there was insufficient evidence from which the jury could find a "unity of purpose, design or understanding," between Kennedy and the other defendants, we sustain the directed verdict as to Kennedy.

E. Clayton Act

The final count of Columbia's complaint charges KACSI with a violation of §3 of the Clayton Act, 15 U.S.C. §14, which makes it unlawful for:

> . . . any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Columbia contends that KACSI imposed upon it an exclusive dealing arrangement which precluded it from purchasing aluminum sheet and coil from other manufacturers so long as it bought KACSI materials. Such arrangement, Columbia maintains, substantially lessened competition in the aluminum coil and sheet market. This was true, Columbia alleges, because its purchases, which were foreclosed to other sellers, represented at

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60. *Cf. Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) (holding agent potentially liable where he knew of the "obvious purpose and necessary effect" to eliminate independent stations and "had a personal stake in the outcome").

least 8% of the aluminum coil and sheet market where KACSI held 50% of the total sales. Such foreclosure, Columbia contends, violates the Clayton Act.[61] The district court, however, entered a directed verdict on this question because of the failure of Columbia adequately to prove that aluminum coil and sheet used in culvert fabrication was a "line of commerce" within the meaning of the Clayton Act.

In determining the share of the market preempted as a result of an exclusive dealing arrangement imposed by a producer, a court must look to the alternative customers available to purchase the output of other producers. Here, no evidence was adduced to show whether the output of the facilities which produced the aluminum sheet and coil for the culvert industry could be or were used to manufacture material sold only to fabricators of aluminum culvert pipe. Since this is so, there was insufficient evidence to demonstrate whether aluminum sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce. Thus, the jury would be left without adequate guidance in attempting to delineate the share of the market foreclosed by the alleged exclusive dealing arrangement, or its probable market impact.

Consequently, we do not disturb the directed verdict on the Clayton Act claim.

F. Conclusion

(1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert.

(2) There was sufficient evidence to go to the jury on the charge that KACSI and KACC violated §2 of the

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61. Columbia's calculation is that since there was testimony that KACSI sold 6 million tons of sheet and coil to culvert manufacturers, and that KACSI held at least 50% of the market, Columbia's purchases of one million tons represented at least 8% of the market.

Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market.

(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

(4) There was insufficient evidence to allow the jury reasonably to conclude that Robert Kennedy and Kennedy Culvert conspired with KACSI either in violation of §1 or §2 of the Sherman Act.

(5) There was insufficient evidence to allow the jury reasonably to define the "line of commerce" restrained by any exclusive dealing arrangement, and, thus, there was insufficient evidence to go to the jury on the claimed violation of §3 of the Clayton Act.

The judgment of the district court will therefore be affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the judgment will be affirmed insofar as it granted a direct verdict against the plaintiffs on the Clayton Act claims; the remainder of the judgment will be reversed and the case remanded for action consistent with this opinion.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

DATED:

No. 77-1846

United States Court of Appeals
for the Third Circuit

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY AND KENNEDY CULVERT
& SUPPLY COMPANY
AND
ROBERT KENNEDY

(D. C. Civil No. 74-122)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and HIGGINBOTHAM, *Circuit Judges* and MARKEY*, *Chief Judge of the Court of Customs and Pateni Appeals*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 22, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 2, 1977, be, and the same is hereby affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the said

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*Sitting by designation.

judgment of the said District Court be and the same is hereby affirmed insofar as it granted a directed verdict against plaintiffs on the Clayton Act claims; the remainder of the said judgment of the said District Court be, and the same is hereby reversed, and the cause remanded for action consistent with the opinion of this Court.

ATTEST:

May 24, 1978 Clerk

Office-Supreme Court, U.S.
FILED
JUL 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA F. CLISBY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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38 pp

COUNTER STATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to review the Court of Appeals' affirmance of a jury verdict in an 11-year-old antitrust case, after three jury trials. The questions raised by Petitioners, as to how a dominant firm with monopoly power must conduct its business in relation to smaller competitors:

- ¶ Were not raised at trial or in the court of appeals; and
- ¶ Would not be case dispositive under the special facts of this case, where the dominant firm had engaged in a wide range of unfair, retaliatory and anti-competitive practices in addition to the price squeeze; and
- ¶ Have been fully addressed, put to rest and resolved in Respondents' favor by this Court's recent opinion in *Aspen Skiing Co. v. Aspen Highlands Corp.*, 53 U.S.L.W. 4818 (U.S. June 18, 1985).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA F. CLISBY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW.

The Opinion and Judgment of the Court of Appeals dated December 27, 1984, reported at 752 F.2d 802, is reproduced in Pet. App. "B" and "C". The Opinions of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), reported at 518 F. Supp. 102 and 559 F. Supp. 922, are reproduced in Pet. App. "D" and "E", respectively. The Opinion of the Court of Appeals in a prior appeal decided on May 24, 1978, and reported at 579 F.2d 20, is reproduced in Pet. App. "F".

JURISDICTION.

The judgment of the Court of Appeals (Pet App. A-31-32), affirming a treble-damage award of $9,567,939 was en-

tered on December 27, 1984. Kaiser's timely petition for rehearing and suggestion of rehearing in banc was denied by Order dated March 8, 1985, with Circuit Judges Adams and Becker dissenting (Pet. App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254-(1).

STATUTE INVOLVED.

The only remaining claim in this case arises under Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

I. PRELIMINARY STATEMENT

The petition for certiorari in this case raises abstract and esoteric economic arguments having no relationship to the evidence, or the reasonable inferences therefrom, when the evidence is viewed in the light most favorable to respondents, as must be done after the two jury verdicts for respondents in this case. Moreover, petitioners did not raise these arguments in the District Court by a motion for directed verdict. They did not except to the trial court's charge to the jury on these issues, and did not raise these issues by post-trial motions. Finally, petitioners did not make the arguments to the Court of Appeals which they now advance for the first time before this Court. On these procedural grounds alone, the petition is without merit and should be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Finally, the opinion of the Court of Appeals is not in conflict with any decision by any other circuit or any decision of this Court. Rather, it is fully consistent with, and strongly reinforced by, this Court's recent unanimous opinion in *Aspen*

Skiing Co. v. Aspen Highlands Corp., 53 U.S.L.W. 4818 (U.S. June 18, 1985), which examined and put to rest the various issues which respondents now seek to raise, relating to how a dominant firm with monopoly power must fairly deal with its competitors.

The evidence in this case, as in *Aspen Skiing*, supported the jury's finding that petitioners intended to use their uncontested monopoly power (in excess of 80% market share) to put a small competitor out of business—which is exactly what happened—and to monopolize the industry.

II. COUNTER STATEMENT OF THE CASE

A. The Essential Facts

Stated bluntly, Petitioners have so misrepresented the record in this case, principally by their omissions, that Respondents must set the record straight by a more complete counterstatement of the facts in this case:

Respondents (plaintiffs in the District Court) are the three individual shareholders of Columbia Metal Culvert Company Inc. ("Columbia"), which in 1974, filed this antitrust suit against petitioners, Kaiser Aluminum and Chemical Co. ("KACC") and its wholly owned subsidiary, Kaiser Aluminum and Chemical Sales Inc. ("KACSI") (collectively referred to as "Kaiser").

Kaiser is a large, vertically integrated aluminum producer in the highly concentrated aluminum industry. In the late 1960's and early 1970's, Kaiser dominated the market for aluminum culvert pipe. There is no dispute that Kaiser controlled at least 80% of the culvert pipe market for the United States as a whole, and also 80% of the culvert pipe market for the Middle Atlantic States, the relevant geographic area in this case. The evidence also showed that Kaiser dominated the sale of aluminum coil and sheet of alloy #H3004, which was the raw material used for aluminum culvert pipe. Kaiser was the acknowledged price leader and as such effectively set the prices for this raw material and controlled the market.

Respondents formed Columbia in 1962 to manufacture aluminum culvert pipe, primarily for use in highway and housing construction. Throughout the 1960's, Columbia, with Kaiser's assistance, actively promoted aluminum pipe for numerous highway and construction jobs in the Mid-Atlantic area. Kaiser was Columbia's (and the United States') principal supplier of aluminum sheet and coil. By the early 1970's, Columbia had become the largest independent fabricator of aluminum culvert pipe in the Mid-Atlantic region.[1]

Columbia, as its business expanded, wanted, as a matter of sound business practice, to reduce its reliance on Kaiser as its sole source of raw material. It therefore started purchasing some aluminum coil from Reynolds, a competitor of Kaiser. When Kaiser learned of this, its retaliation for Columbia's refusal to purchase all its raw materials exclusively from Kaiser was swift, certain, and devastatingly effective:

> 1. Kaiser's manager of its Highway Products Division threatened to open a Kaiser pipe fabricating plant "across the street" from Columbia, if Columbia bought its raw material from any supplier other than Kaiser.[2]

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[1] In its fiscal year ending May 31, 1973, Columbia sold approximately 2,200,000 pounds of aluminum culvert pipe, App. 6099a, for $1,300,000 in gross sales—Columbia's best year. App. 6131a. The history of Columbia is more fully discussed in the first Court of Appeals' opinion in this case, *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Co.*, 579 F.2d 20, 23 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). "App." refers to the appendix in the court of appeals.

[2] An employee of Reynolds Aluminum testified that Holmes Collins, Kaiser's manager in charge of its aluminum culvert pipe division, said that "if Mr. Bonjorno (Columbia) started buying his metal from other than Kaiser, he [Mr. Collins] would be tempted to go in with a plant and compete directly with Columbia Metal . . . the phrase is to put a plant next door or across the street, or something that would carry that meaning." App. 1128a-29a.

Threats such as the ones made by Mr. Collins are relevant proof of predatory intent to exclude competitors. *Aspen Skiing*, 52 U.S.L.W. at 4824 n.39, discussed more fully at pp. 19-21 below.

2. Kaiser refused to sell Columbia raw material after Columbia insisted on also buying from Reynolds. App. 177a, 183a, 1482a. Pet. App. A-13, A-120.[3]

3. Kaiser, within one year after the Holmes Collins threat, established its plant forty miles from Columbia, even though the entire Eastern Seaboard north of Florida did not have any culvert pipe manufacturer specializing in aluminum, and the evidence showed that Kaiser had been actively considering a plant elsewhere. App. 1593a, 1600a-01a, 1791a.

4. Kaiser's intent to exclude independent fabricators such as Columbia, from the aluminum culvert pipe market was further carried out by retaliatory anti-competitive threats to Alcoa, the principal competitor of Kaiser,[4] and to another pipe fabricator dependent on Kaiser as a source of supply.[5]

5. Because of Kaiser's "aggressive" pricing (App. 4994a) and strategy of dominance in the aluminum culvert

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[3] Kaiser's myopic view of the evidence in this case constantly overlooks Kaiser's improper refusal to sell to Columbia because of Columbia's refusal to remain subservient to Kaiser. This is demonstrated by the statement of Holmes Collins, in a meeting with Columbia, that "we will let you grow," App. 165a, 1662a. The court of appeals appropriately relied on this statement in concluding the evidence allowed the jury to find that "Kaiser would control Columbia's growth and market." Pet. App. A-13. Kaiser's refusal to sell to Columbia in these circumstances was itself illegal, *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 466 (1941).

[4] "[Holmes Collins stated] that he would welcome Alcoa getting into this market to support their efforts but that we [Alcoa] would have to do it like Kaiser had done and invest in facilities and go all the way as a culvert pipe manufacturer, and that if we thought that we could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, we have another thing coming, or some words to that effect." App. 1085a. The court of appeals appropriately relied on this evidence. Pet. App. A-13 n.2.

[5] Mr. Collins made a similar threat to U. S. Aluminum and Steel Highway Products Company ("U. S. Aluminum"), to the effect that if they bought from Reynolds, Kaiser would not sell U. S. Aluminum the special corrugated sheet that it could only get from Kaiser, App. 1287a-89a. The owner of U. S. Aluminum testified that Kaiser followed through on this threat. App. 759a-63a. The court of appeals relied on this evidence to show predatory intent to monopolize.

market, Alcoa decided not to enter that market, either as a fabricator of pipe itself, or as a regular supplier to independent fabricators such as Columbia. (*See supra* fn. 4).

6. Kaiser recruited Robert Kennedy, Columbia's best salesman, and set him up as a Kaiser distributor with highly favorable financial benefits, and a liberal line of credit, against the recommendation of Kaiser's credit department. App. 4462a, 4464a.

7. Kaiser purposely used Kennedy's knowledge of Columbia's customers to take business away from Columbia. Kaiser paid Kennedy a "finder's fee" for getting a large bid for Kaiser while Kennedy was still employed by Columbia, and set up a "joint check" arrangement for Kennedy so that Kennedy could make sales in excess of his credit limit. Kaiser knew that Kennedy used Columbia's confidential information to win bids, which benefited Kaiser. Kennedy became a Kaiser distributor as soon as Kaiser opened its New Castle, Delaware plant.

8. Kaiser sold pipe from its New Castle plant at drastically *lower* prices in Southern New Jersey, where Kaiser was in direct competition against Columbia, than it did when competing in other locations. Since Kaiser presented no economic justification whatsoever for its lower pricing practices in Southern New Jersey, the jury was free to conclude that this further evidenced Kaiser's intent to destroy Columbia. *See Aspen Skiing, supra.*

9. In January 1974 Kaiser withdrew its commodity price list for raw material aluminum coil. This action was intentionally strategic. It resulted in a price squeeze which was designed to, and did, severely injure Columbia.[6]

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[6] KACSI's Highway Products Department prepared a report each year which stated its strategic objectives. These reports boasted of KACSI's dominance and control of the market and prices. *See* App. 7993a, 8026a, 8034a.

Respondents' expert, Dr. Oliver Williamson, a widely published and recognized economist, now Professor of Economics, Yale University, described how Kaiser's actions reflected strategic decisions by a dominant firm with the intent, and effect, of excluding independent competitors; he also explained how this conduct was anticompetitive and injurious to the public. App. 587a-650a.

10. Less than one year after Columbia had asserted its right to purchase products from other suppliers, Kaiser opened the New Castle plant, hired away and set up Columbia's best salesman as a Kaiser distributor, withdrew the commodity price for raw material, and sold pipe at drastically lower prices in Southern New Jersey. Columbia started business that year as a strong, viable competitor; it ended the year dormant, lifeless, destroyed.

Kaiser's petition simply ignores all the above facts and the overwhelming evidence supporting them. In so doing, it refuses to recognize the well-established legal principle that all of Columbia's evidence must be viewed in the light most favorable to Columbia, and that contrary evidence introduced by defendants must be rejected. *Aspen Skiing, supra; Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01 (1962).

B. Prior Proceedings

1. First Trial—1977

The first trial, held in 1977, ended in a directed verdict against Columbia, largely because the District Court wrongly concluded that the relevant market was broader than aluminum culvert pipe.

In 1978, the court of appeals for the Third Circuit, opinion by Judge Arlin Adams, reversed the judgment in favor of Kaiser and held that Columbia's evidence was sufficient to establish Kaiser's liability for violations of Section 2 of the Sherman Act, based on Kaiser's control of over 80% of the aluminum culvert pipe market:

> there was sufficient evidence from which the jury could have inferred that KACSI attempted to drive Columbia out of business. Holmes Collins, the manager of KACSI's highway division, was heard to say that if Columbia bought metal from Reynolds, he, Collins would locate an aluminum culvert plant in

> Columbia's "backyard" . . . . From the testimony and from KACSI's actions against its business interests, the jury could have inferred that KACSI intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between KACSI and Columbia, the jury might well have inferred that KACSI knew of the drastic impact its maneuvers would have on Columbia's prospects for survival. Such activities, engaged in by an entity controlling more that 80% of the market, would be sufficient to allow the jury to find both the anticompetitive effects and intent requisite to liability for monopolization or attempted monopolization.

Columbia Metal, supra, Pet. App. A-134-36.

2. Second Trial—1979

In the second trial, in 1979, Columbia's evidence in the 1977 trial was largely repeated. Columbia's evidence rested on all of the facts discussed above, and did not, as Kaiser's petition implies, rest solely on the issue of price squeeze.

At the second trial, Kaiser, in its liability defense, did not present any expert testimony on the price squeeze issue and did not present any factual evidence of efficiencies or other business justifications for its actions toward Columbia. Kaiser's principal defense was that the product market was not limited to aluminum culvert pipe, but rather extended to include steel and concrete culvert pipe, a very broad market in which Kaiser did *not* have monopoly power. Kaiser's other principal defense was that Columbia's demise was caused by undercapitalization and marketing mistakes, and that it did not suffer any "antitrust injury" from Kaiser's actions. The jury rejected both of these defenses.

The jury answered seven specific interrogatories, finding in favor of Columbia on all issues, as summarized below:

a. the relevant product market was aluminum culvert pipe (a finding not presently contested by petitioners);

b. Kaiser monopolized the aluminum culvert pipe market; and

c. Kaiser's violations were a material and proximate cause of injury to the business and property of Columbia.[7]

3. Third Trial—1981

The district court thereafter granted a third trial on damages only, Pet. App. A-33, which resulted in another jury verdict, Pet. App. A-74, on December 2, 1981, which increased the amount of the damages assessed against Kaiser. On post-trial motions, the district court granted, in part, Kaiser's Motion for Judgment Notwithstanding the Verdict, but this ruling was reversed by the court of appeals' opinion of December 27, 1984, which restored the damages judgment entered on December 4, 1981 on the jury's verdict (Pet. App. A-5).

4. Summary of Court of Appeals' Opinion

The court of appeals' opinion carefully considered all of Kaiser's arguments, even granting a fresh review of the sufficiency of Columbia's evidence of monopolization, despite the fact that the same court found the same evidence sufficient in its earlier 1978 Opinion. It unanimously agreed that the evidence showed that Kaiser attempted to control its competitors and acted with the intent to destroy Columbia. The court of appeals specified some of the key evidentiary points it relied on:

> There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser . . . . There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources . . . . Finally, there was evidence that Holmes

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[7] Columbia had also brought a conspiracy charge against KACC and KACSI on the now rejected intracorporate conspiracy doctrine, see, *Copperweld Corp. v. Independence Tube Co.*, 104 S. Ct. 2731, (1984). The Court of Appeals found that the evidence supporting the separate jury verdict on the Section 2 monopolization interrogatory was sufficiently independent of the conspiracy issue and rejected petitioners' claim that a new trial was required because the 1979 jury had also considered the intracorporate conspiracy doctrine. Pet. App. A-8 to 11. Petitioners do not raise this issue in this Court.

> Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

Pet. App. A-13.

After reviewing the evidence, the court stated:

> From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.

Pet. App. A-13.

On the price squeeze issue raised by Kaiser, the court of appeals held:

> There was evidence that the squeeze was not caused by natural market forces. Pet. App. A-17.
>
> Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

Pet. App. A-18 to 19.

The court of appeals based its ultimate holding on well-established antitrust principles:

> When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62 Colum. L. Rev. 930, 934

(1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.

Pet. App. A-19 to 20.

Given this exhaustive review of the evidence, and the court's application of settled legal principles to the record, there is no reason to grant certiorari in this case.

III. REASONS FOR DENYING THE PETITION

A. Summary

We first summarize below, the reasons why this Court should deny the petition:

1. The petition fails to cite, much less satisfy, any of the prerequisites for certiorari prescribed in rule 17 of the rules of this Court.

Specifically, the petition fails to assert that the decision conflicts with any decisions of other courts of appeals or decisions by this Court. Furthermore, the issues presented by petitioners, pertaining to how a dominant firm must conduct its business in relation to its smaller competitors have been fully addressed and resolved in respondents' favor by this Court's recent decision in *Aspen Skiing Co. v. Aspen Highlands Corp., supra.*

2. Petitioners, by failing to raise the issues now presented, before either the trial court or the court of appeals, should not be permitted to present these now, for the first time, to this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

3. A resolution of the narrow price squeeze issues presented by Petitioner would have no effect on the outcome of this case, in light of the overwhelming evidence of other retaliatory, unfair, and anticompetitive practices, in addition to the price squeeze, engaged in by Kaiser, the dominant firm with monopoly power in the relevant market. The jury found, under proper instructions from

the court, that the totality of Kaiser's acts were intended to, and ultimately did, destroy its smaller competitor.

4. Kaiser is incorrect in its contention that the court of appeals' opinion constitutes an improper extension of the price squeeze rationale in *United States v. Aluminum Co. of America, supra.*

First, Kaiser cannot escape liability in this case on the contention that it did not sell raw material to Columbia, since the jury found, based on compelling expert and other market evidence that Kaiser was the price leader in the raw material, and that it knew that its hostile pricing actions in the raw material would injure Columbia, its smaller competitor, in the finished product.

Second, Kaiser's contention that there must be proof of monopoly power in the raw material is incorrect as applied to this case, because, as noted above, Kaiser excercised strong price leadership and knew full well that its pricing of the raw material would injure its rival. Furthermore, Kaiser's contention is factually incredible, since the record establishes that it did in fact have dominant and monopolistic power in coil as well as in finished pipe.

B. The Petition Fails To Show That This Case Satisfies Any Of The Traditional Prerequisites For A Grant Of Certiorari Stated In Rule 17 Of This Court

The petition for certiorari should be denied because it does not satisfy any of the prerequisites for certiorari prescribed in rule 17 of the rules of this Court. Kaiser does not even cite rule 17.

The petition does not claim, and could not claim, that the decision of the court of appeals conflicts with any decision of another court of appeals. Moreover, the petition does not claim that the decision of the court of appeals conflicts with any past decision of this Court. Instead of presenting a conflict, the petition simply raises the same legal question decided by this Court this Term in *Aspen Skiing*—whether a jury, evaluating all

of the evidence, may conclude that a corporation, with admitted monopoly power, violates Section 2 of the Sherman Act by engaging in a series of predatory acts all intended to injure a small competitor. *Aspen Skiing* confirms that the court of appeals' decision on that issue was correct.

As an examination of the court of appeals' opinion makes clear, the court simply applied settled antitrust principles to the special facts of this particular case. The issues of evidentiary sufficiency have been resolved against Kaiser twice by the court of appeals, and twice by a jury. As both opinions of the court of appeals demonstrate, the evidence was more than sufficient to show that Kaiser engaged in a host of viciously unfair predatory actions—including repeated threats, intimidation, unfair commercial practices, and use of price squeeze tactics—all designed for the purpose of causing competitive injury to respondents. Under *Aspen Skiing,* this constitutted a blatant violation of Section 2 of the Sherman Act.

Beyond this, the abstract economic issues discussed in the petition, regarding "price squeeze" behavior, were not presented in the district court and were not raised on appeal, or mentioned in the court of appeals' opinion. This is therefore a highly inappropriate case to resolve such issues. It would be particularly inappropriate to do so on this record and in the absence of a conflict among the circuits, because cases involving allegations of a "price squeeze" are rarities in antitrust litigation. A review of antitrust decisions shows that price squeeze claims have been litigated in only a handful of cases in this century. Moreover, the "market" as it existed in 1973-1974 has drastically chanqed since that time.[8] Thus, a decision on the facts of this case would be of only historical interest.

In these circumstances, review by this Court is plainly unwarranted.

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[8] Drainage pipe is now made of many different materials which were just evolving or not even in existence as of 1974 such as polypropylene-lined plastic pipe, polyethylene pipe, and aluminized steel. There are also new entrants in the market for all types of culvert pipe as well as aluminum culvert pipe.

C. Petitioners Did Not Preserve In The Lower Courts The Issues Presented To This Court

Kaiser's Petition has isolated two esoteric legal issues, which are totally unrelated to the real facts of this case. In this case, the jury, and the court of appeals twice found that Kaiser had engaged in a host of viciously unfair anticompetitive practices, including but by no means limited to a price squeeze. This gross abuse of its undisputed monopoly power, was calculated to injure and did destroy a small competitor.

Kaiser's *first* issue is whether a vertically integrated producer has a "duty" to price its raw materials and finished products so as to avoid a price squeeze on an independent fabricator. The *second* issue is whether liability for a "price squeeze" can be based on "price leadership" in the raw material market even though Columbia, the injured competitor, did not purchase raw material from Kaiser.

As we discuss at pp. 19-26 below, there is no merit to either of Kaiser's contentions. Kaiser's petition should be denied on procedural grounds, because Kaiser failed to preserve these issues, and this fact alone requires denial of its Petition. *See Adickes, supra,* at 147 n.2, (1970), holding that the Court will not consider issues "neither raised before nor considered by the Court of Appeals." *Accord California v. Taylor,* 353 U.S. 553, 555-557 n.2 (1957). *See also NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 163-64 (1975).

1. Kaiser did not Raise These Issues in the District Court

Kaiser did not raise these issues when it moved for a directed verdict, did not request a jury charge on these issues, and did not take exception to the charge given to the jury on these issues. Thus, even if this Court were to hear this case, irrespective of how it ruled substantively, Kaiser would have no right to relief and the court of appeals' judgment would stand.

a. Kaiser did not preserve this issue under rule 50(b)

Kaiser's Motion for Directed Verdict at trial did not include any reference to Columbia seeking to impose any

"duty" on Kaiser concerning its prices, or any reference to Kaiser's liability being based on the issue of "price leadership," even though "price leadership" was a distinct part of Columbia's evidence and central to its theory of Kaiser's liability for the price squeeze at both liability trials.[9]

Pursuant to rule 50(b) of the Federal Rules of Civil Procedure ("F.R.C.P."), a legal issue not raised in a motion for directed verdict may not be grounds for the granting of a motion notwithstanding the verdict. This is the uniform rule in virtually all of the circuits.[10]

Further, Kaiser did not raise the issues it now seeks to present, regarding the "duty" of a vertically integrated manufacturer, and the issue of "price leadership", in its Motion for Judgment Notwithstanding the Verdict, filed pursuant to Rule 50(b) after the 1979 liability trial. (App. 5360a).

b. Kaiser did not preserve these issues under rule 51

Similarly, Kaiser did not raise any of the issues presented to this Court for review by requesting instructions to the jury, or by taking exceptions to the charge to the jury, pursuant to Rule 51, F.R.C.P. Thus, these issues are waived.

In point of fact, the district court's charge to the jury on the price squeeze issue was very close to the charge that Kaiser had requested, App. 5288a-89a, and is reprinted at pages R-A-1 to 2 of the Appendix to this Brief. ("Resp. App."). Thus, not surprisingly, Kaiser's counsel took no specific exceptions. (App. 3986a). Indeed, Kaiser's counsel told the trial judge that

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[9] Kaiser, in its Motion for Directed Verdict (App. 5197a), contended that it could not be liable because it was not selling raw material to Columbia, and that there was insufficient evidence to show that Kaiser "dominated" the sale of raw material used for aluminum culvert pipe.

[10] *See Systemized of New England Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035-36 (1st Cir. 1984); *Lowenstein v. Pepsi Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980); *United States Industries, Inc. v. Blake Construction Co., Inc.*, 671 F 2d 539, 548 (D.C. Cir. 1982).

her instruction to the jury, that Kaiser's not selling raw material to Columbia could be a defense to the price squeeze claim, was "clear and right." (App. 3986a). Therefore, Kaiser has waived any grounds for relief as to this issue, particularly because Kaiser's counsel did not request any other instructions concerning price leadership, or any other issue raised in the Petition. Specifically, Kaiser never contended in the district court that Columbia was obliged to prove Kaiser had monopoly power in a separate raw material market.

Kaiser's counsel only made a general exception to the charge for the "failure of the Court to give the instructions that we requested which you did not give." App. 3993. Since there was only a blanket exception to the court's charge and no specific exception on the points now raised in this petition, there is no reason for this Court to grant review of this issue. A blanket exception to a jury charge is insufficient to preserve any legal positions for review.[11]

Since there is no dispute concerning the district court's charge to the jury on the issue of monopolization, the judgment of the court of appeals would be affirmed irrespective of how this Court might rule on the Petition for Certiorari.

2. Kaiser did not Raise These Issues in the Court of Appeals

Furthermore, the issues raised in the Petition were not raised in the court of appeals and not discussed by the court of appeals in its opinion.

In the court of appeals, Kaiser did not claim that the result in this case imposed a "duty" on Kaiser to price its raw material or finished goods in any particular way, and did not claim that

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[11] *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Burns v. United States*, 274 U.S. 328 (1926); *Pennsylvania R.R. Co. v. Minds*, 250 U.S. 368 (1919); *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 248 U.S. 334 (1919); *Thiede v. Utah Territory*, 159 U.S. 510 (1895). This Court has further clarified this rule by stating that a general exception will not be grounds for relief if any of the instructions being generally excepted to is correct. *Palmer v. Hoffman, supra; Holloway v. Dunham*, 170 U.S. 615 (1898); *Thiede v. Utah, supra.*

price leadership was, as a matter of law, an improper theory on which Kaiser could be held liable for the price squeeze. In its brief in the court of appeals, Kaiser claimed principally that Columbia's evidence did not meet the legal standards required by Judge Learned Hand in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), or the standards set forth by Dr. Williamson, Columbia's expert economist.

Kaiser did argue in the court of appeals that it should not be held liable for a price squeeze when it had not sold raw material to Columbia during the period of the squeeze. Kaiser claimed there was insufficient evidence of monopoly power in a purported "raw material market," and insufficient evidence of price leadership. However, these are clearly "fact-bound" issues, and it would be highly inappropriate, and contrary to this Court's practice of not reviewing the sufficiency of the evidence,[12] particularly where the district court and the court of appeals have twice decided that the jury had sufficient evidence to find Kaiser liable for monopolization. This Court's review of these fact-bound issues could have no precedential impact on other cases, and no importance for future interpretations of the antitrust laws.

D. The Evidence, Reviewed In The Light Most Favorable To Columbia, Was Sufficient To Find Kaiser Liable For Monopolization, Without Even Considering The Challenged Evidence Of A "Price Squeeze"

The price squeeze evidence was only one part of Columbia's evidence in this case.

The court of appeals relied on all of Columbia's evidence in affirming the judgment based on the jury's verdict. Although Kaiser's petition attempts to make this case appear as if it turned on the "price squeeze" issue, that is not true. *See* Pet. App. A-13 and A-19.

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[12] *United States v. Johnston,* 268 U.S. 220, 227 (1925); *Berenyi v. District Director, Immigration and Naturalization Service,* 385 U.S. 630, 635 (1967), explaining that the Supreme Court does not sit as a court for correction of errors in fact finding, and will not "undertake to review concurrent findings of fact by two courts below."

As noted above at pages 3-7, Columbia's evidence established that Kaiser's exclusionary, anti-competitive actions towards Columbia, as detailed in the Counter Statement of the Case, were intentional, extensive and devastatingly effective. Indeed, the district court, in summarizing the evidence after the 1979 liability trial, noted that the same evidence that had been found sufficient by the court of appeals in its first opinion, in 1978, was presented to the jury at the second trial. Pet. App., A-43 to 44. The district court went on to summarize that evidence, and did not even mention the testimony concerning the price squeeze in concluding that "the evidence was sufficient to support the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act." [13] Pet. A-43.

Since the District Judge's opinion did not even mention the price squeeze, it is obvious that she believed that the other evidence, summarized above, was independently sufficient to support the verdict in favor of respondents under Section 2.

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[13] Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia (N.T. 1533, 1540-41, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia Metal*), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-18, 2840).

Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T. 1734, 2544-45), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kennedy, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-63, 2525-29, 2842-49, 2854, 2997, Exhibits P-75, P-24, P-5).

The Arvay testimony, specifically noted by the Third Circuit, *Columbia Metal, supra* at 31 n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 161, 1809, 1810, 1814, 2509. Exhibit P-201). Pet. App. A-43 to 44.

See also the district court's opinion after the 1981 damage trial. Pet. App. A-105.

Similarly, the court of appeals was correct in holding that Kaiser's refusal to sell to Columbia, the Holmes Collins threats to Columbia, U.S. Aluminum, and Alcoa, and the other evidence reviewed by the district court, when taken together, were sufficient to prove monopolization. See *supra*, pp. 3-7.

Columbia's total evidence of Kaiser's abuse of monopoly power was sufficient to support a verdict under Section 2, without giving any weight to the evidence concerning a price squeeze.

E. There Is No Need To Review This Case Because the Opinion Of The Court Of Appeals Is Fully Consistent With This Court's Recent Decision In *Aspen Skiing*

The recent unanimous decision of this Court in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.* 53 U.S.L.W. 4818 (June 18, 1985), strongly supports the decision of the court of appeals and provides still another compelling reason why the court should not grant Kaiser's petition. Indeed, all of Kaiser's contentions have been effectively refuted by this Court's opinion in *Aspen Skiing.*

In *Aspen Skiing,* as in the present case, the petitioners sought to persuade this Court to adopt a novel economic theory as a means of securing a reversal of a jury verdict. There, the Petitioner claimed that the judgment in the lower courts was improper because it rested on the assumption that a firm with monopoly power has a "duty" to cooperate with smaller rivals in a marketing arrangement in order to avoid violating Section 2 of the Sherman Act. This Court unanimously held, however, that the evidence, viewed in the light most favorable to the plaintiff, as the verdict winner before the jury, did not turn on any alleged "duty" to cooperate with smaller rivals, but instead, conformed to traditional Sherman Act Section 2 legal requirements.

In this case, Kaiser has couched its "questions presented" in the same manner as the Petitioner in *Aspen Skiing,* asking

this Court to exercise its certiorari jurisdiction on the erroneous assumption that the court of appeals imposed a "duty" on Kaiser to price its raw materials and finished products in a particular way. Just as this Court in *Aspen Skiing* rejected the claim that the the lower Court's judgment in that case rested on an abstract legal proposition about the "duty" to cooperate with rivals, so should this Court reject this Petition, because the court of appeals in this case did not announce any "duty" concerning pricing of both raw materials and finished goods. Further, as noted above, the judgment of the court of appeals is fully supported by other evidence, sufficient in itself under traditional Sherman Act requirements.

Kaiser offered no expert testimony on the "economic" aspects of Columbia's price squeeze evidence, nor any evidence on business justifications or efficiency reasons for its actions. This is relevant in finding that Kaiser's actions intended to exclude Columbia. *Aspen Skiing, supra,* at 4824.

Aspen Skiing defined "monopolization" exactly as did the Court of Appeals in this case. *Compare* 53 U.S.L.W. at 4822 *with* Pet. App. at A-12. *Aspen Skiing* also held, with great relevance to this case, that:

— Liability for monopolization is supported by evidence of "specific intent" to harm a competitor, 53 U.S.L.W. at 4822 such as the statements made by Kaiser, see p. 5 above.

— Predatory intent may be inferred from action by a monopolist that has "no valid business reason." *Id.* at 4824 n.39. Kaiser introduced no such evidence.

— Predatory intent may be inferred from failure to offer any efficiency justification for the monopolist's pattern of conduct. *Id.* at 4823. Kaiser introduced no such evidence.

— Improper exclusionary action includes behavior that "tends to impair the opportunities of rivals" and also which "does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 4823

n.32. Dr. Williamson testified on the anticompetitive consequences of Kaiser's actions. App. 587A-650a.

— "Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, [or] evidence that the conduct was used threateningly." *Id.* at 4824 n.39. See p. 5 above, concerning threatening statements by Kaiser's manager.

— Proof of predatory intent may also be found in attempts by "[a] monopolist . . . to discourage [others] from doing business with its smaller rival." *Id.* at 4824. *See* p. 5 above concerning the threatening statements to Alcoa.

The record, when viewed in the light most favorable to Columbia, as it must be under *Aspen Skiing, Id.* at 4824, shows that the jury was justified in finding Kaiser liable for monopolization, pursuant to a jury charge by the trial Court totally consistent with traditional Section 2 case law. Indeed, Kaiser has never claimed the district court erred in its jury instructions on the issue of monopolization. In fact, the district court in this case framed the issues just as they were framed by the trial court's instructions in *Aspen Skiing.*[14]

As in *Aspen Skiing,* there was strong and persuasive evidence of intent to exclude a competitor. *Aspen Skiing* rejected the argument that the Court of Appeals' interpretation of Section 2 in that case imposed some "duty" on a monopolist to act a certain way. Kaiser's attempt to seek to graft onto the court of appeals' opinion in this case a similar "duty" is an attempt to make the decision of the court of appeals appear to be an improper extension of Sherman Act Section 2 jurisprudence. This is patently untrue.

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[14] The district court told the jury:

In considering these practices and whether they were illegal or whether they were done with improper retaliatory or anticompetitive intent, the fact that certain things happened by themselves without the requisite intent or motive is not sufficient. So that the fact that Kaiser Aluminum and Sales,

(footnote continues)

F. Kaiser's Claim That The Court Of Appeals' Opinion Is An Improper Extension Of *United States v. Aluminum Co. of America* Is Incorrect

1. The "Price Squeeze" Issues in this Case are Fact-bound and Unique to the Special Facts Presented

Kaiser's petition argues, as its principal contention on the price squeeze issue, that the court of appeals opinion in this case was an improper and "dangerous" expansion of the "price squeeze" theory expressed in *United States v. Aluminum Corp. of America,* ("Alcoa") 148 F.2d 416 (2d Cir. 1945). It asserts two reasons, neither of which apply to the facts in this case.

First, Kaiser argues that because it never sold aluminum coil to Columbia after April 1971, it cannot be liable. Kaiser, in advancing this argument, conveniently overlooks the specific evidence in the record showing Kaiser's 80% plus share of aluminum coil sales, and also showing that, because of Kaiser's price leadership in setting coil prices, Kaiser knew full well that its actions, in dramatically raising the raw material price in 1974, would injure Columbia.[15]

(footnote continued)

whether or not by the consent or agreement of its parent, KACSI, established a plant to fabricate culvert pipe in New Castle is not by itself a violation of the antitrust laws. Simply to offer lower prices for culvert pipe than some other company did on some bid is not in itself evidence of unlawful conduct. The fact that Kaiser named Mr. Kennedy as its distributor of Kaiser products in this area in itself is not illegal because as you know manufacturers do appoint independent distributors and the law permits this.

Size alone isn't monopoly power. In order to establish monopoly power you have to as I said show the power to set prices, the power to exclude competiton, and you have to show willful exercise of this power for an anticompetitive effect to harm Columbia.

The question about the motive with which these things were done, whether it was retaliatory or strategy or in the ordinary operation of Kaiser's business in an effort to further its own business interest is the question that you have to decide. (App. 3961a-62a)

[15] Kaiser's Highway Products Manager, on cross examination, was confronted with a document he wrote (Ex. P-950, App. 4826a), which showed that he knew Kaiser's changes in raw material prices in 1974 would injure Columbia. Columbia's economic expert, Dr. Oliver Williamson,

(footnote continues)

Second, Kaiser contends that the court of appeals' decision improperly extends the *Alcoa* doctrine, because there was no showing that Kaiser had monopoly power in the raw material market.

This is a "strawman" issue. This was never a case, as was *Alcoa,* about the raw material market, and Kaiser was never accused of monopolizing the raw material market. This case involves only the aluminum culvert pipe market. As the court of appeals noted (Pet. App., at 12 n. 1,), Kaiser, in the court of appeals, did not contest the jury's finding that the relevant product market is aluminum culvert pipe. As noted earlier, Kaiser never requested a jury interrogatory, or instructions to the jury, on a separate raw material market, or a market consisting of both raw material and finished pipe. Thus, Kaiser's contention about the need to prove monopoly power in a "raw material market" was not properly raised and preserved for appeal. See pp. 14-17 above.

Furthermore, Kaiser's Petition also ignores two important pieces of evidence in the record which showed Kaiser did control over 80% of the raw material used for pipe.[16]

Finally, Kaiser's contention, that it cannot be responsible for a price squeeze because it did not sell coil to Columbia, has a hollow ring. It was Kaiser's retaliatory refusal to sell raw

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(footnote continued)

testified that, based on his knowledge and analysis of the industry, Kaiser was a dominant firm in setting the prices for aluminum coil and sheet used in making pipe. He explained how, because of the highly concentrated aluminum industry, Kaiser could injure Columbia even if Columbia was not purchasing from Kaiser. He also testified that Kaiser did in fact act strategically to injure Columbia, which testimony was relied upon by the court of appeals. Pet. App., A-16.

[16] (1) Exhibits P 839-42, App. 8076a-79a, show that Kaiser itself claimed a greater than 80% share of the nationwide sales of raw material used for aluminum culvert pipe.

(2) Exhibit P-2025, entitled "Kaiser Percentage Market Share, Mid-Atlantic Area, Coil Sheet for Aluminum Culvert Pipe" which showed a 75.03% market share for 1973, increasing to over 85% in 1974, over 94% in 1975, over 84% in 1976 (App. 4839a).

material to Columbia which started Columbia's troubles. Kaiser's strategic and unjustified refusal to sell raw material to Columbia after 1971, because of Columbia's insistence on independence in purchasing from Reynolds as an alternate supplier, precludes Kaiser from asserting any right to disclaim liability in this case merely because it did not sell to Columbia during the price squeeze period.[17]

This evidence of power over the prices of raw material also refute Kaiser's claim that there was a void in Columbia's evidence of price leadership.[18]

Considering *all* of the evidence, the court of appeals' opinion is entirely consistent with *Alcoa.*

2. Kaiser's Petition Mischaracterizes the Court of Appeals' Treatment of the Price Squeeze Issue

Respondents never asserted, and the court of appeals did not hold, as Petitioners contend, that any time there is a congruence of raw material and finished goods prices, there is a "price squeeze" which is actionable under the antitrust laws.

What distinguishes this case from a mere congruence of prices was the ample evidence of intentional, strategic, and predatory behavior by Kaiser, of which the price squeeze was but one item. The court of appeals specifically stated that the evidence showed the price squeeze "was not caused by natural market forces" (Pet. App. A-17), was "deliberate" (Pet. App. A-17), and that Kaiser "possessed the power to create the price

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[17] Professor Williamson testified that a dominant raw material supplier's refusal to sell to an independent fabricator can be more injurious than a price increase. App. 649a. Kaiser's refusal to deal in these circumstances was itself unlawful. *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951).

[18] See the evidence cited by the Court of Appeals at Pet. App. A-16. As one additional example of Kaiser's price leadership, Alcoa did not change its published list price from March 1974 through July 1975; however, Alcoa's invoices to Columbia for aluminum coil did change, but were usually within one cent (per pound) of the frequently changing Kaiser published price list. (App. 8080a). These Alcoa "transaction" prices clearly showed Alcoa followed Kaiser's "price leadership."

squeeze, [and] exercised that power to destroy its competition." (Pet. App. A-19).

The economic literature cited in footnote 13 of the Kaiser Brief has no bearing on this case. Many of these articles discuss how the congruence of raw material and finished pipe prices may be caused in the abstract, and only incidently discuss whether or not this mere congruence should be subject to antitrust
liability.[19]

Furthermore, many of the economic articles cited by Kaiser provide support for the decision of the court of appeals in this case. These authors explain that a price squeeze, when shown to be strategic in nature, is anti-competitive and should be actionable under the antitrust laws.[20]

For example, Kaiser's footnote 13 cites an article by M. Adelman, "Integration and Antitrust Policy", 63 Harv.L.Rev. 27 (1949), in which the author provides an analytical review of price squeeze economics, and concludes there are some situations in which a price squeeze may be anti-competitive:

> A large and very wealthy firm which sells in markets separated either by distance or otherwise may be able to cut prices ruinously low at any point, drive out competitors, and achieve a monopoly there; and continue on its way until a stronger competitor or the government puts an end to the snowballing process. This method is classic.

Id. at 45-46.

Furthermore, Kaiser cites, but does not even attempt to distinguish, those few cases in the lower courts that have

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[19] *See e.g.*, M. G. deChazeau and A. E. Kahn, *Integration and Competition in the Petroleum Industry*, (Yale Univ. Press, 1959); Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U.Chicago L.Rev. 157 (1954); S. H. Whitney, *Antitrust Policies: American Experience in Twenty Industries* (Twentieth Century Fund 1958).

[20] *See e.g.*, E. Singer, *Antitrust Economics* (Prentice-Hall Inc., 1968); Walter Adams, "Vertical Power Dual Distribution and the Squeeze: A case Study in Steel," 9 Antitrust Bull. 493 (1964); A. S. Holmes, "First Generation Price Squeeze Policy at the FERC," 110 Pub. Util. Fort. 32 (1982); J. E. Lopatka, "The Electric Utility Price Squeeze As an Antitrust Cause of Action," 31 UCLA Law R. 563 (1984).

considered a price squeeze. *See United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958), (proposed merger of two steel companies threatening a price squeeze on an independent fabricator, sufficient to warrant enjoining the merger), *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916) (defendant held liable for monopolization because of price squeezes against independent manufacturers of end-products), *City of Mishawaka v. American Electric Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (defendant utility held liable for monopolization for "price squeezing" the plaintiff municipal systems by permitting its wholesale rates to be higher and out of balance with lower retail rates).[21]

Thus, Kaiser's economic arguments regarding price squeeze tactics are unsupported by the very authorities which it cites. But more fundamentally, those arguments are irrelevant to this case because they have no relationship to the facts proven at trial, and were not, in any event, properly preserved for this Court's review.

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[21] Although footnote 13 of the Kaiser Brief contains a lengthy listing of articles and decisions that have discussed the price squeeze issue, Kaiser has not cited an authoritative article which analyzes the *Alcoa* decision on the price squeeze issue, and follows the recent development of Section 2 jurisprudence. *See* Ball, "The Vertical Price Squeeze as Predatory Pricing under Section 2 of the Sherman Act," 56 N.C.L.Rev. 735, 740 (1978) (summarizes the modern view of monopolization as stemming from Judge Hand's opinion in *Alcoa;* and explain that a violation may be based upon conduct that excludes competition from the economically "inevitable" to a well-run business).

V. CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

[Excerpt from District Court's Charge]

Now, there has been talk of a price squeeze which Columbia claims was deliberately imposed. In considering the price squeeze you should consider whether the following elements have been proven: First, that during this period whether or not Kaiser's price for aluminum coil offered for sale to fabricators was higher than a fair price for the coil; whether during the period of the alleged price squeeze Kaiser had such a large share of the sales of coil that they had the power to raise the price of coil without reference to competition, bearing in mind that there was evidence that Columbia bought not from Kaiser but from Reynolds and at other times Alcoa; also to consider whether the Kaiser defendants prior to the period of the alleged price squeeze were on notice or were notified that the prices of aluminum coil and aluminum pipe were so close that they resulted in a price squeeze, and I mean by that the prices—you have to consider that the restraint of trade was a restraint of trade in the sale of pipe, and that Kaiser sold both coil and pipe, and you have to consider that we are talking about the effect of a squeeze where the coil was sold by Kaiser but Columbia was purchasing its coil from Reynolds and perhaps Alcoa.

Now, in connection with this price squeeze and in other connections, too, there has been a discussion of the price not only of pipe but the price of coil, and there has been the concept of the transfer price between KACC and KACSI which was referred to by one witness not as a transfer price but as a transfer cost, and you will recall the testimony as to what that was and how it was calculated. I believe that the witness talked about his transfer cost because of the concept that it was the value added to it at stages of production.

You should also consider in regard to this price squeeze, and you may consider in other context as well, the testimony as to whether the sale of coil or pipe was more profitable to Kaiser, to either of the Kaiser defendants.

In order to show that there was a price squeeze Columbia would have to show by the evidence that the Kaiser defendants were dominant or had sufficient power in the raw material market to control the price of the coil or to exclude the competitors, and I mention this in connection with the price squeeze because here we are talking about the price of the raw material and the relevant product market for the coil, and I will be talking to you later of the relevant product market for pipe in talking about the restraint of trade generally and in talking about the attempt to monopolize under Section 2. So when you consider this pricing bear in mind whether you are considering pricing of coil or pricing of pipe and who was selling what to whom. Beyond that I would rely on your own recollection of the testimony, and I don't intend to try and summarize it for you and I certainly have no intention of expressing any opinion about it, but just ask you to bear in mind what prices we are talking about.

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No. 84-1907

IN THE
Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY BRIEF FOR PETITIONER

Respondents have presented no valid ground for denying the Petition. They do not rebut the importance of the issues presented, including the significance and adverse economic consequences of extending the "price-squeeze" theory of antitrust liability established in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d cir. 1945) *("Alcoa")*, to vertically integrated firms lacking unilateral monopoly power over the relevant raw material or other input product markets. Rather, repondents devote virtually all of their response to claims that are either erroneous, irrelevant, or both.[1]

I. THE IMPROPER AND SUBSTANTIAL EXPANSION OF *ALCOA'S* PRICE-SQUEEZE THEORY OF LIABILITY INVOLVES IMPORTANT ANTITRUST ISSUES.

Columbia correctly acknowledges that Kaiser's "principal contention" is that the court of appeals improperly expanded the "price-squeeze" theory of *Alcoa*. But, having acknowledged it, Columbia never addresses the contention. It does not dispute that the Third Circuit expanded the price-squeeze theory established in *Alcoa;* it offers no explanation why the Third Circuit's new price-squeeze test is correct; and it does not attempt to justify on any grounds "[t]he substantial expansion" and "significant extension" of the price-squeeze theory of antitrust liability. (A-4.) Instead, Columbia attempts to avoid Kaiser's legal contention by arguing that the price-squeeze issues are "fact bound." The argument begs the question of whether the Third Circuit's decision improperly expanded *Alcoa* by extending it to an integrated producer that concededly had no monopoly over the raw

1. Petitioners will hereafter be referred to as "Kaiser" and respondents as "Columbia."

material, but was only one of several substantial suppliers.[2]

The Third Circuit's decision is a dangerous and unwarranted extension of the *Alcoa* "price-squeeze" doctrine to non-monopoly price leadership. The Third Circuit's economically unsound and legally unsupported price leadership test is itself a good example of the problems that will arise from such an unwarranted extension of *Alcoa*.

II. COLUMBIA'S PROCEDURAL ARGUMENTS DO NOT WARRANT DENIAL OF THE WRIT.

Most of Columbia's Brief in Opposition attempts to obscure and avoid the merits of the petition by asserting procedural hurdles to review by this Court.

A. The Petition Raises Important Questions of Antitrust Liability.

There is no merit to Columbia's argument that the petition fails to satisfy the prerequisites of Rule 17 of this Court. The petition "presents vitally important antitrust issues" (Petition at 1, and *see* 26) regarding the "price-squeeze" doctrine which this Court has never resolved. The significance of these issues is highlighted by showing that the Third Circuit's decision is a "substantial," "dangerous" and "unwarranted" extension of the *Alcoa* "price-squeeze" doctrine to non-monopoly "price leadership" (Petition at 16-21). The Third Circuit's test is economically unsound, legally unsupported and certain to aggravate a recurring problem in the regulation of business activity. The decision invites a flood of "price

2. Columbia's statement that the record established that Kaiser had "dominant and monopolistic power in coil" (Opposition Brief at 12) totally ignores the failure of proof of the relevant raw material market. The court of appeals erroneously dispensed with this well established element of proof of monopoly power. *See* Petition at 24-25.

squeeze" cases. (Petition at 21-26.) Accordingly, Kaiser's petition demonstrates that "a federal court of appeals has decided an important issue of federal law which has not been, but which should be, settled by this Court." [Rule 17.1(c).]

Moreover, Kaiser repeatedly contends that the Third Circuit's opinion is at odds with *Alcoa*, because critical elements there are missing in this case. (Petition at 10-12, 16-18, 21.) Judge Adams stated (A-4) that the Third Circuit's decision in this case represents a "significant extension" and "substantial expansion" of the Second Circuit's decision in *Alcoa*. [Rule 17.1(a).]

B. The Issues Presented to This Court Were Preserved Below.

Columbia claims that the issues were not raised below in either the district court or the court of appeals. This is false. Kaiser preserved its position under the price-squeeze test established in *Alcoa* in both the district court and court of appeals and in its Petition for Rehearing.

The petition argues that the writ should be granted because the Third Circuit's decision extends the *Alcoa* "price-squeeze" doctrine to non-monopoly "price leadership." (Petition at 16-21.) Within this argument, Kaiser makes three points in its Petition, all of which were preserved below, as is reflected in the following comparison:

Point 1: The Third Circuit's decision improperly departs from the existing "price-squeeze" doctrine defined in *Alcoa*, which held that proof of monopoly power in raw material is an essential element of a "price squeeze." (Petition at 18).

Kaiser's contentions below:

1. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* before the Third Circuit at 5 (virtually identical language as in Petition).

(b) *Kaiser's Brief in the Third Circuit* at 18 (*Alcoa* requires proof of monopoly power in a raw material market).

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* at 5357a (failure to prove domination and control over the raw material, aluminum coil).

(d) *Kaiser's Motion for a New Trial* 5357a (failure to instruct there was no price squeeze given the lack of evidence of market power over coil).

(e) *Kaiser's Motion for a Directed Verdict* at 5199a (no evidence of Kaiser's domination of sale of coil or control of coil price).[3]

Point 2: The Third Circuit's decision improperly imposes liability for a "price squeeze" on a company that was not supplying raw material to the fabricator allegedly squeezed. (Petition at 18).

Kaiser's contentions below:

2. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* at 8 (Kaiser never sold coil to Columbia after April, 1971).

(b) *Kaiser's Third Circuit Brief* at 18-19 ("It is uncontradicted that [Kaiser] did not sell one pound of coil to culvert customers in the Northeast in 1974, 1975 or 1976 (1453a-54a, 2621a-22a)."

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* ("Columbia failed to prove that [Kaiser] sold aluminum coil to Columbia during the relevant time period.") (5361a, 5774a).

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3. Additionally, Kaiser requested that the jury be given binding instructions that Kaiser could not be liable for a price squeeze because Kaiser did not supply coil to Columbia during the alleged squeeze period (5288a).

(d) *Kaiser's Motion for a New Trial* ("[t]here was no evidence that [Kaiser] made sales of aluminum coil to Columbia during the revelant time period".) (5356a, 5779a-80a).

(e) *Kaiser's Motion for a Directed Verdict* ("It is undisputed that [Kaiser] did not sell coil to Columbia after June, 1971.") (5199a).

Point 3: The Third Circuit's decision improperly imposes liability for "price squeeze" when a producer lacks monopoly power in the raw material market. (Petition at 18).

Kaiser's contentions below:

3. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* at 8 ("There is no proof here (as there was in Alcoa's absolute control of the aluminum *ingot* market) that Kaiser possessed monopoly power in a relevant 'raw material' market.")

(b) *Kaiser's Third Circuit Brief* at 18 ("Here, Kaiser did not have *monopoly* power in the manufacture and sale of coil, . . . A price squeeze could not occur in the absence of monopoly power at the first level.")

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* at 5362a ("Columbia failed to prove that [Kaiser] dominated any market for aluminum coil") (5774a).

(d) *Kaiser's Motion for a New Trial* at 5357a (The court erred in refusing to instruct the jury that, as a matter of law, the jury was not to consider the issues of a price squeeze by Kaiser because "there was no evidence that [Kaiser] had any market power as respects aluminum coil") (5779a-80a).

(e) *Kaiser's Motion for a Directed Verdict* at 5199a ("Columbia failed to adduce evidence that [Kaiser] 'dominated' the sale in the relevant geographic area of coil from which pipe is fabricated.")

With respect to the second question presented by the petition, Kaiser demonstrates that price leadership cannot be proven by uncontradicted evidence showing substantial differences in competitors' raw material prices and the timing of their price changes.[4] (Petition at 25-26). This, too, was preserved in the Third Circuit in strikingly similar language on pages 15-16 of Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc.

Columbia's waiver argument is unsupportable.

III. *ASPEN SKIING* IS NOT RELEVANT.

Columbia argues that "all of Kaiser's contentions have been effectively refuted by this Court's opinion in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, ___ U.S. ___, 105 S.Ct. 2847 (1985)." But, *Aspen Skiing*, unlike this case, did not concern either the

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4. In footnote 18 of its Brief in Opposition, Columbia ironically cites a pricing chart as support for the proposition that there was price leadership by Kaiser. (8080a). That very same chart was shown to Columbia's economic expert witness who concluded that price leadership "would be difficult to establish from this chart alone." (699a). The economist merely stated the obvious. *Not once* during the squeeze period did Alcoa, Columbia's supplier, follow a pricing change by Kaiser. This simple fact has never been disputed by Columbia. While Columbia contends that Alcoa's prices to Columbia were "usually" within one cent of the prices published by Kaiser, Columbia does not tell the Court that one cent is a substantial difference in the price of coil, which is quoted on a per pound basis. In fact, one of the respondents, Joseph Bonjorno, testified that one-half of one cent represents a substantial difference in coil prices. (156a).

"price-squeeze" theory of antitrust liability or an expansion of the *Alcoa* case. *Aspen Skiing* was a refusal to deal case.[5]

Columbia next contends that *Aspen Skiing* rejected a claim that the lower court's judgment "rested on an abstract legal proposition about the 'duty' to cooperate with rivals," and that, accordingly, Kaiser's petition should be similarly rejected because the Third Circuit "did not announce a 'duty' concerning pricing of both raw materials and finished goods." This completely misapplies the relevant portion of the holding in *Aspen Skiing*. There, this Court agreed with the petitioner that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor," but found that the judgment did not rest on that proposition because the trial court had "unambiguously instructed the jury" on the absence of such a duty. 105 S.Ct. at 2856. That is not the case here. Rather, the Third Circuit substantially expanded the price-squeeze theory, deviated from *Alcoa*, and held that price squeeze liability could be founded upon price leadership, not possession of monopoly power.

Columbia also recites *Aspen Skiing's* holdings on predatory intent. This is irrelevant to the specific issues

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5. In an effort to lend an air of credibility to its *Aspen Skiing* argument, Columbia emphasizes its contentions relating to an alleged "refusal to deal" by Kaiser. But, Kaiser never refused to fill a Columbia order (424a), and Columbia never claimed that the alleged "refusal" ever had an adverse impact on Columbia's business. Columbia had adequate alternative suppliers in Alcoa and Reynolds for identical materials (241a), at *lower* prices (155a-156a), and after Columbia switched sources of supply from Kaiser to Reynolds, Columbia's business "was on the increase" and "kept growing" (185a). Moreover, Columbia's alleged damages commenced on June 1, 1973, whereas the refusal was alleged to have occurred in April 1971, two years earlier. (182a-83a). Finally, there is no jury finding that Kaiser refused to deal or that any such refusal caused injury to Columbia.

on the price-squeeze theory which are raised by the petition. Whether predatory intent is an element of a price squeeze is not raised here. Rather, the focus is on whether "price leadership" by one of several substantial producers can be substituted for monopoly power; and, even if so, whether price leadership can be found in the face of clear evidence of substantial differences in competitors' prices and the timing of price changes.

Moreover, Columbia's contention that Kaiser offered no evidence of business justification or efficiency reasons for its pricing is simply groundless. The 1974 price increases for coil were explained by uncontradicted evidence that demand was high for aluminum, which was in short supply, requiring some manufacturers to go on allocation (286-87a; 434a, 451a-55a), and by the fact that in early 1974, government price controls were removed permitting sellers to increase prices for the first time in several years. (2276a). Lower pipe prices were likewise explained by uncontested evidence that there existed a recession in the construction industry (290-91a), and by the fact that opening the New Castle facility reduced Kaiser's costs (2381-82a, 2386a).

IV. WITHOUT PRICE SQUEEZE COLUMBIA'S CASE IS NOT SUFFICIENT TO WARRANT AFFIRMANCE.

Columbia erroneously contends that "[a] resolution of the narrow price-squeeze issues presented by [Kaiser] would have no effect on the outcome of this case," suggesting that other anticompetitive practices, apart from the price squeeze, could form the basis for liability under Section 2 of the Sherman Act.[6] Columbia provides no reasoned response to Kaiser's statement (Petition at 26

6. The five acts were asserted to be: (1) a refusal to sell coil to Columbia; (2) taking on Robert A. Kennedy as a distributor; (3) opening a pipe-making facility in New Castle, Delaware; (4) imposing a price squeeze; and (5) inducing Columbia to install a spiral pipe-making machine with a ½ by 2 corrugation specification.

n.22) as to why the remaining acts were insufficient to support liability under Sherman Act §2.[7] But, even if Columbia's contrary assertion were correct, reversal on the price-squeeze claim would preclude affirmance of the judgments below.

Columbia's theory of liability consisted of allegations of five different acts by Kaiser, which allegedly comprised the exercise of monopoly power in aluminum culvert pipe. However, the liability jury's verdict did not specify which of the five was the basis for its verdict or the cause of injury. Moreover, all five acts, including the alleged price squeeze, were put to the new jury in the retrial on the issue of damages; and Columbia's claimed amount of damages was calculated by hypothesizing a market free of the effects of the alleged price squeeze. Columbia never advanced a theory of injury and damage that did not focus on the alleged price squeeze.[8]

In these circumstances, reversal on the price-squeeze claim would require a new trial on both liability and damages, even if the Section 2 case could properly have gone to the jury. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499-500 (1931);

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7. *See also* P. Areeda, *Antitrust Law* ¶729.9 at 227 (Supp. 1982), criticizing the earlier Third Circuit opinion discussing the hiring of Kennedy and the change in location of Kaiser's new culvert manufacturing plant:

> . . . [a] change of mind or the failure of management to accept the credit recommendation or construction plans of lower-level officials hardly proves an impropriety. Indeed, by allowing the jury to speculate on the defendant's motives, the court suggests a "compete at your peril" policy.

8. The district court described the increase in the price of coil that allegedly caused a price squeeze as being "crucial to this litigation" (A-42), a comment overlooked by Columbia when it stated that the district court "did not even mention the testimony concerning the price squeeze" in concluding that the evidence supported a Section 2 violation (Brief in Opposition at 13). The court of appeals also stressed the price squeeze in its conclusory paragraph as to liability (A-19-20).

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962); *Northeastern Telephone Co. v. AT&T*, 651 F.2d 75, 94-96 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the important issues concerning the "price-squeeze" doctrine of antitrust liability.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and
BARBARA K. CLISBY,
Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS OCCASIONED BY THE FILING OF AN AMICUS CURIAE BRIEF ON BEHALF OF THE UNITED STATES

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1. INTRODUCTION

The Solicitor General has correctly concluded that certiorari should be denied in this twelve-year old antitrust case because:

> ¶ Resolution of the price squeeze issue (the only issue presented) turns, not on a question of law, (as wrongly contended by Petitioners), but on the sufficiency of the evidence.[1] (Gov's Brief, (typescript) p. 10) The govern-

[1] It is significant that the government describes the "Question Presented" as one of the "sufficiency of the evidence"—which this Court has held is not an appropriate ground for exercise of its certiorari jurisdiction. *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967). *See also*, Stern, Gressman, Shapiro, *Supreme Court Practice* 217, 220 (1986).

ment agrees that the Court of Appeals applied the correct legal standards to the facts. (Gov's Brief pp. 15-16)

¶ The price leadership aspect of the price squeeze issue is not of "sufficient importance" to warrant review because price squeeze cases are "relatively rare." (Gov's Brief p. 19)

¶ Resolution of the price squeeze issue would *not* be case dispositive, because "A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render the other evidence insufficient to support the jury's verdict." (Gov's Brief p. 21) The Court of Appeals agreed there was significant evidence of other retaliatory, anti-competitive conduct violative of Section 2 of the Sherman Act which was independent of the price squeeze, Pet. App. A-19, and which resulted in the destruction of Respondent's small family business.

¶ The sufficiency of the non-price squeeze evidence is not "fairly included" within Petitioner's Question Presented for purposes of this Court's Rule 21.1a.[2] (Gov's Brief p. 20)

Further reasons for denying the Petition are discussed in Respondent's brief in opposition to the Petition for Writ of Certiorari and may be summarized as follows:

¶ Many of the arguments raised in the Petition were not preserved by Petitioners for appellate review. (pp. 14-17)

¶ Criticism of the *Alcoa* case (*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir., 1945)) is not germane to the instant case because the conduct challenged in this case is not comparable to that in *Alcoa* and because the record in this case contains abundant evidence

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[2] "Only the questions set forth in the petition or fairly included therein will be considered by the Court." U.S. Sup. Ct. Rule 21.1(a), 28 U.S.C.A. *See, Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1352 (1986) (Antidumping Act claims that were not mentioned in the questions presented in the petition for certiorari nor independently argued by the parties were not reviewed by the Court).

of illegal anti-competitive retaliatory conduct, in addition to the price squeeze. (pp. 22-24)

¶ As cogently and recently pointed out in this Court's unanimous decision in *Aspen Skiing Co. v. Aspen Highlands Corp.*, 105 S.Ct. 2847 (1985)—traditional rules of freedom of choice for a competitor with monopoly power are *qualified* rights, not *absolute.* Thus, a monopolist may not abuse its power by excluding smaller competitors from a market it dominates through a series of hostile and anti-competitive acts. (pp. 19-21)

¶ The opinion of the Court of Appeals presents no conflict among the circuits. There is no conflict with any prior decision by this Court. (pp. 12-13)

¶ It has been more than five years since a jury fixed damages. The proceedings below document the extraordinary and personal hardships that the delays in this case, and denial of fair compensation for the damage inflicted, have visited on the Respondents.

2. There Was Convincing And Unchallenged Expert Testimony And Abundant Evidence Of Kaiser's Control Over The Price Of The Raw Product (Coil) Used By Columbia To Manufacture Pipe

The government's brief acknowledges, (and thereby repudiates Petitioners' contrary contention) that the Court of Appeals specifically held that for Plaintiff to prove a price squeeze it had to establish that Kaiser had control over both the raw material price and the finished product price. Pet. App. A-14-18.[3]

The government's brief only questions "the sufficiency of the evidence" on whether Kaiser's control over raw material

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[3] The Court of Appeals stated:

"The mere existence, however, of a "price squeeze" is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants *deliberately produced the effect,* sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was *not the result of natural market forces* such as supply and demand or legitimate competition." Pet. App. A-14. (752 F.2d at 809.) (Emphasis supplied.)

prices could be found from evidence of price leadership in the raw material market. However, Plaintiff did not rely on price leadership alone to show that Kaiser exercised control over raw material prices. The government's brief overlooks some important evidence, discussed below, in addition to the evidence of price leadership, that the Court of Appeals relied upon in its opinion, see Pet. App. A15-A18:[4]

(1) Kaiser clearly had market power over aluminum coil used to make pipe. Pet. App. A-15.[5]

(2) The evidence showed "that the squeeze was not caused by natural market forces." Pet. App. A-17.

(3) The evidence demonstrated that Kaiser manipulated coil prices for "strategic reasons", (i.e., conduct not based on rational economic grounds and thus against economic self interest).[6] Pet. App. A-18.

(4) Testimony by a Kaiser manager supported an inference that changes in coil prices at the outset of the price squeeze in early 1974 was not related to cost but was intended to affect the independent competition, i.e., Columbia Metal. Pet. App. A-17-18.

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[4] This omission demonstrates precisely why this court should be extremely chary of being drawn into a detailed review of the evidence. Cf. *Matsushita Electronic Industrial Co. Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1351 (1986):

> "... we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence."

[5] Kaiser does not dispute it had more than an 80% share of the market for the raw material used for aluminum culvert pipe. Kaiser's own documents showed it had over 80% of the nationwide sales for culvert coil for all the relevant years, C.A. App. 8076-79a, and there was uncontradicted evidence which showed that Kaiser enjoyed over 75% of sales of aluminum coil in the relevant geographical market in this case. App. 4839a.

[6] Cf. *Matsushita*, supra, at 1356-62, where plaintiffs failure to show conduct against economic interest was held to preclude permitting the trier of fact to infer a conspiracy.

(5) The evidence in the record allowed the jury to find Kaiser knew it could impact Columbia's coil prices even though Kaiser was not at that time selling to Columbia. C.A. App. 2627a-2628a, 4826a.

The Court of Appeals review of the evidence also finds full support in the testimony of Respondents' expert, Dr. Oliver Williamson, formerly special economic assistant to the Assistant Attorney General in charge of the Antitrust Division and presently Professor of Economics at Yale University. Dr. Williamson had studied the aluminum industry, including the Government's Council of Wage and Price Stability study, C.A. App. 595a-596a, and concluded it was a classic oligopoly [7] in which Kaiser was the dominant seller of aluminum coil and pipe. Dr. Williamson testified that the totality of Kaiser's actions, including its complete withdrawal of the "commodity" list price for aluminum coil, and its refusal to sell to Columbia Metal, showed that this was done for "strategic purposes", C.A. App. 646a.—i.e., for the purpose of "disciplining existing and potential rivals." (C.A. App. 644a). Petitioner's counsel made no effort to strike any portions of Dr. Williamson's testimony, nor was any expert called to refute his testimony.

The Court of Appeals also relied on the fact that the price of pipe (the finished product) was often *below* the price of coil (the raw material) at the outset of the price squeeze, during the first six months of 1974. It justifiably concluded from this bizarre pricing relationship, never explained by Kaiser, that "either the pipe prices were too low or the raw material prices

[7] There is no record support for the suggestion in the Government's brief that other suppliers of coil would welcome the opportunity to sell coil to Columbia Metal at a cheaper price than Kaiser's published list price. The record shows that Alcoa refused Columbia Metal's pleas for lower prices, C.A. App. 1447a-48a, 4594a, and also that there were no price reductions in spite of excess capacity. C.A. App. 596a.

The government's citation of evidence that Alcoa and Reynolds offered cheaper prices than Kaiser refers to the early years of Columbia existence.

In the crucial period relevant to this case, 1971 on, the prices of Alcoa and Reynolds followed Kaiser, and were *identical* to Kaiser's prices for coil. C.A. App. 241, 8080a.

were too high." Pet. App. A-18. The Court of Appeals noted further evidence that the price squeeze was deliberate because of the transfer price system used by Kaiser, because Kaiser's coil prices were followed by its competitors (i.e., Alcoa and Reynolds), and thus impacted fabricators purchasing from Kaiser's competitors, but did not affect Kaiser's own pipe costs. Pet. App. A-18.

After reviewing this and other evidence addressed by the parties, the Court of Appeals found:

> "Given these facts there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition". Pet. App. A-18-19.

This Court should not grant certiorari to retread this same ground and to further dissect the factual record in this complex case, as that work has already been adequately and fairly done by the Court of Appeals.

3. Significant Other Evidence, Unrelated To The Price Squeeze, Showed Pervasive Unfair and Unlawful Willful Retaliatory Acts Which Caused Or Contributed To The Destruction Of Respondents' Business

The government's brief correctly recognizes that in addition to the price squeeze evidence, the Jury found the abuse of monopoly power by unfair and unlawful willful conduct, to drive a smaller independent company out of business. This evidence is sufficient to support the judgment below. (Gov's Brief, p. 21).

The Court of Appeals noted that plaintiff did not solely rely on the price squeeze evidence:

> "The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the Section 2 violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business." Pet. App. A-24.

We reviewed in our Brief In Opposition to the Petition for Writ of Certiorari, at pages 17-19, Kaiser's intentional, strategic conduct which the jury could and did find was designed to destroy Columbia. That evidence was sufficient to support the verdict without regard to the evidence of the price squeeze.

Under *Aspen Skiing Co. v. Aspen Highland Corp.*, 105 S.Ct. 2847 (1985), once Columbia introduced evidence sufficient to show that Kaiser had monopoly power in a relevant product market, and adopted exclusionary practices which excluded competition, there was sufficient evidence to prove the offense of monopolization.

The summary which follows demonstrates Kaiser's pervasive unfair and unlawful retaliatory conduct, goes well beyond the boundaries of "aggressive competition" (Gov's Brief typescript p. 20):

1. Kaiser refused to sell Columbia raw material after Columbia insisted on also buying from Reynolds, which is an important fact supporting the jury's verdict.[8] *Aspen Skiing, supra, Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973).

2. Kaiser's manager of its Highway Products Division threatened to open a Kaiser pipe fabricating plant "across the street" from Columbia, if Columbia bought its raw material from any supplier other than Kaiser.

3. Kaiser, within one year after the Holmes Collins threat, established its plant forty miles from Columbia, which the jury could have found and presumably did find was conduct against its economic self interest.[9]

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[8] Dr. Williamson pointed out in his testimony that a refusal to sell is a more serious restraint than a sharp increase in price. He concludes that a refusal to sell, *plus* an increase in price, with "the leadership/followership condition that existed in this industry . . . is a very severe kind of supply condition to confront an independent fabricator with." C.A. App. 649a.

[9] The record showed that the entire Eastern Seaboard north of Florida did not have another culvert pipe manufacturer specializing in aluminum, and that Kaiser had been actively considering a plant elsewhere in a place more central to its entire market. (C.A. App. 1593a, 1600-01a, 1791a). Cf. *Schine Chain Theatres Inc. v. United States,* 334 U.S. 110, 119 (1948).

4. Kaiser's intent to exclude independent fabricators such as Columbia from the aluminum culvert pipe market was further carried out by anti-competitive threats to Alcoa, the principal competitor of Kaiser, and to another pipe fabricator dependent on Kaiser as a source of supply. (C.A. App. 1085a, 759a-63a).

5. Because of Kaiser's "aggressive" pricing and strategy of dominance in the aluminum culvert market, Alcoa decided not to enter that market, either as a fabricator of pipe itself, or as a regular supplier to independent fabricators such as Columbia. (C.A. App. 4994a).

6. Kaiser's recruitment of Kennedy (Columbia's star salesman) as a Kaiser distributor, and giving him great financial incentives, was additional evidence as detailed below, showing Kaiser sought to destroy Columbia, Pet. App. A-19:

(a) Kaiser's payment of a finder's fee to Kennedy *while he was still employed by Columbia* (App. 1712a-1713a, 4437a-4438b);

(b) Kaiser's approval of a joint check arrangement with Kennedy, by which Kennedy could make sales in excess of his credit allowance (App. 2922a-2923a, 3074a-3077a);

(c) Kennedy's admission that Kaiser controlled Kennedy by controlling the amount of credit he had (App. 2871a);

(d) Kaiser discussed with Kennedy the prices at which Kaiser would sell, *while Kennedy was still a Columbia employee* (See 579 F.2d at 35, n.55, and Exhibits P-76, App. 4467a, P-78, App. 4469a, 1684a-1689a, 1695a-1696a);

(e) Kennedy did not become a distributor until Kaiser opened the New Castle plant, because it was not until then that Kennedy would be able to buy pipe at a low enough price to resell it at a profit in competition with Columbia. (App. 2912a);

(f) Notwithstanding that Kennedy had a credit line from Kaiser of $25,000, Kennedy's financial statement at the end of his first year, as of April 30, 1974, showed that he owed Kaiser over $75,000. (App. 2926, 4448-a-4452a);

(g) Kennedy *used Columbia's confidential information* to get bids which benefited Kaiser, App. 2888a-2889a, 221a-233a);

(h) A Kaiser manager, testified that Kaiser made more profit selling directly with its own sales force than through a distributor. App. 1682a. From this fact alone, the jury could infer improper motive by Kaiser because its strategy, to build up volume rather than profit by selling through Kennedy, who knew Columbia's customers, was against Kaiser's economic interests; [10]

7. Kaiser's "lowball" pricing practices in Southern New Jersey, compared to other areas in which Kaiser was not competing against Columbia, warranted the jury in finding the intent to monopolize.[11]

In summary, less than one year after Columbia had asserted its right to purchase products from other suppliers, Kaiser opened the New Castle plant, hired away and set up Columbia's best salesman as a Kaiser distributor, withdrew the commodity price for raw material, and sold pipe at drastically lower prices in Southern New Jersey. Columbia started business for its 1974 year as a strong, viable competitor; it ended the year dormant, lifeless, destroyed.

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[10] Some of the Kaiser documents concerning Kennedy are probative evidence of the intent to destroy Columbia. (See P-5, App. 4435a, P-24, 4461a, P-75 App. 4464-4466a).

[11] Kaiser sold pipe from its New Castle plant at drastically lower prices in Southern New Jersey, where Kaiser was in direct competition against Columbia, than it did when competing in other locations. Since Kaiser presented no economic justification whatsoever for its lower pricing practices in Southern New Jersey, the jury was free to conclude that this further evidenced Kaiser's intent to destroy Columbia.

4. Conclusion

Litigation must come to an end some-time. This case is now 12 years old. Kaiser has had three trials and two appeals. It has had two trips to this Court. It has been represented by experienced counsel at each juncture, and has presented all its factual arguments to the juries and to the lower courts. Both the juries and the lower court judges who have painstakingly reviewed the masive record in this case have rejected Kaiser's fact-bound arguments in each instance.

The record below documents the extraordinary personal hardship that the delays in this case have visited on the respondents.

It has been more than thirteen years since Kaiser began its retaliatory exercise of monopoly power that ultimately destroyed this small, successful and expanding family business.

It has been more than seven years since a jury decided all factual issues in respondent's favor and rendered a liability verdict on all issues against the defendant/petitioners.

It has been more than five years since a jury fixed damages.

It has been more than one and a half years since the Court of Appeals reinstated the original judgment.

For all the foregoing reasons, we respectfully ask that the court promptly consider and deny the Petition for Writ of Certiorari. It is now time for the parties, and the judicial system, to move on to new business.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

INTRODUCTORY STATEMENT

Kaiser has requested this Court to decide whether a violation of Section 2 of the Sherman Act can be based on a "price squeeze" theory when the defendant lacks monopoly power over the raw material or "upstream" product. In his Brief for the United States as Amicus Curiae ("Solicitor General's Brief"), the Solicitor General agrees that the Court of Appeals below erred in concluding that evidence of "price leadership" by Kaiser could properly be substituted for monopoly power as a basis for Section 2 liability.

Notwithstanding his extensive and compelling discussion of the errors in the Court of Appeals' decision, however, the Solicitor General is "unable to conclude that review by this Court is warranted in this case." (Solicitor General's Brief at 16.) The Solicitor General supports this position (a) by speculating that price squeeze cases are likely to be relatively rare and unlikely to be affected by the Third Circuit's decision because the defects of that decision are "obvious" (*id.* at 17) and (b) by noting that there was other evidence in the case—which the Solicitor General views as indicative of "no more than aggressive competition" (*id.* at 17-18)—that was considered by the jury and that the Court of Appeals might have regarded as sufficient grounds for upholding the judgment below.

For the reasons discussed below, the reasoning of the Solicitor General provides an insufficient basis for concluding that the clearly erroneous decision below should stand. This Court has already granted certiorari in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 106 S. Ct. 1629 (1986) (No. 85-473), which involves a similar "price squeeze" theory, and it should grant review here to insure that this theory of antitrust violation is brought

into conformity with the Court's other recent economically-sound and competition-based antitrust decisions.

DISCUSSION

I. The Solicitor General Properly Concluded That The Court of Appeals Erred In Predicating Its "Price Squeeze" Decision On Evidence Of "Price Leadership."

The discussion in the Solicitor General's Brief of the economic and antitrust significance of "price squeezes" presents a well-reasoned framework for considering the issues presented by Kaiser's petition, and Kaiser endorses that discussion. As the Solicitor General notes, the leading case involving the theory of price squeeze under the antitrust laws is *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). That case, decided by the Second Circuit because there was no quorum of this Court available to consider the Government's appeal, includes a holding that having monopolized the aluminum ingot market, Alcoa was obligated to set a "fair price" for ingot so that downstream fabricators could make a living profit. As the Solicitor General further notes, this portion of the *Alcoa* decision has been widely criticized as "fundamentally inconsistent" with the "basic principle of modern-day antitrust analysis" that "the antitrust laws 'were enacted for the protection of *competition* not *competitors.*'" (Solicitor General's Brief at 11) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis by the Court)).

The Solicitor General's Brief is also correct in emphasizing that whatever one might conclude about an *Alcoa*-type price squeeze, "proof that the defendant possessed power over price in the raw material or 'upstream' market is an indispensable element in establishing that the defendant engaged in a price squeeze unlawful under Section 2." (*Id.* at 13.) It is the absence of such proof in this case on which Kaiser's petition for certiorari has focused. Whether the Court of Appeals' opinion is read as dispensing with the requirement of monopoly power

over price or simply incorrectly finding evidence of such power in plaintiff's claim of price leadership is irrelevant.[1]

In either case, the Third Circuit's substitution of price leadership for monopoly power has substantially expanded the price squeeze theory of the *Alcoa* case. Price leadership is usually viewed as a mechanism by which one seller's price changes are followed by others to the mutual benefit of all.[2] As the Solicitor General points out, however, a theory hypothesizing the use of price leadership to set a high new material price that benefits the price leader but causes its competitors to lose sales and profits is implausible. Price leadership is therefore an inadequate substitute for monopoly power in a price squeeze case unless it can be proved that the sellers of the raw material had actually agreed on the price. (Solicitor General's Brief at 15-16). Reversal of the contrary decision below is important to insure that the economically sound rules this Court has applied to other areas of the antitrust laws are applied to alleged price squeezes as well.

II. The Factors Cited By The Solicitor General As Reasons For Not Granting Certiorari To Correct The Erroneous Decision Below Cannot Withstand Analysis.

The Solicitor General has questioned both the importance of the decision below and the procedural posture

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[1] In its June 2, 1986, Supplemental Brief, Columbia has argued that certiorari is inappropriate because this Court does not take cases to consider the sufficiency of the evidence. The supposed authority for that proposition involves the very different proposition that, except in exceptional cases, this Court will not review a lower court's resolution of disputed issues of fact. As the Solicitor General's Brief makes clear, what is involved here is a legal question of the elements of a price squeeze theory under the antitrust laws, not a question of disputed issues of fact.

[2] Although some theories of oligopoly behavior suggest that such prices will tend to be above competitive levels, that is not so in the case of "barometric price leadership." *See* Kaiser's Petition for a Writ of Certiorari at 21-23.

in which the issues raised by the petition for certiorari have been presented.

On the first point, the Solicitor General's Brief engages in speculation that is both illogical and demonstrably wrong. According to the Solicitor General, the Third Circuit's acceptance of Columbia's theory of price leadership as sufficient evidence of power over price may not warrant review by this Court since "[q]uestions regarding price squeezes do not arise with any frequency under the antitrust laws because a defendant rarely possesses sufficient market power in both raw material and finished product markets to support a credible claim that it controlled prices in both markets." (Solicitor General's Brief at 16-17.) This simply misses the point. The Court of Appeals' error is important precisely because it avoids the necessity of finding genuine market power in the raw material market by relying on allegations of price leadership, which the Solicitor General recognizes as a "common phenomenon" in many industries. (*Id.* at 15; *see also* Kaiser's Petition for a Writ of Certiorari at 14-15.) If the Third Circuit's theory were accepted, market power sufficient to impose an unlawful price squeeze would be far from a rarity.

The Solicitor General also expresses doubt that other courts of appeals will adopt the reasoning of the court below because the shortcomings of price leadership evidence as proof of power over price are "obvious." In its recent decision in *Matsushita Industrial Co. v. Zenith Radio Co.*, 106 S. Ct. 1348 (1986), however, this Court stated that the harm in permitting an implausible inference of antitrust violation results not merely from the likelihood that the precedent will be followed by other courts, but from the chilling effect of such an erroneous decision on competitive conduct that the antitrust laws were intended to protect. As the Solicitor General recognizes, the alleged behavior of competing "upstream market" suppliers to effect a price squeeze from which only the price leader would benefit is thoroughly implausible.

Moreover, the decision of the court below, if allowed to stand, is likely to have a chilling effect on competition. Columbia based its claim of price leadership by Kaiser on the fact that even though Kaiser accounted for only a small share of total sales of aluminum coil and sheet,[3] it was the largest supplier of coil and sheet for use in the manufacture of aluminum culvert. (*See* Solicitor General's Brief at 7-8.) But this is likely to be the case wherever a raw material manufacturer has developed a new use for a product, as Kaiser did here. Subjecting such a manufacturer to charges of price squeeze whenever the margins of his non-integrated end product competitors narrow will plainly either deter the innovation and development of new products or require the maintenance of artificial prices in the face of changing demand or supply. In either event, the result will be to deter conduct that the antitrust laws were designed to foster.

Significantly, the Solicitor General's doubt that other courts will uphold price squeeze allegations on the basis of oligopoly pricing rather than unilateral market power is disproved by a case now pending before this Court—*Cargill, Inc. v. Monfort of Colorado, Inc.*, No. 85-473. The plaintiff's theory of injury and standing in that case was that following the merger of two of its competitors, industry margins would be narrowed and it would be subjected to a price squeeze. It has claimed that even though the merged firm would account for only about 20 percent of the relevant end product market, "where there are but a few significant firms in the industry,

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[3] Contrary to the claim made by Columbia in its Supplemental Brief that "Kaiser enjoyed over 75% of sales of aluminum coil in the relevant geographical market" (at 4 n.5), this represented only Kaiser's share of that small portion of aluminum sheet and coil that is used in aluminum culvert, including that used in its own pipe plants. In fact, Kaiser accounted for only about 15 percent of total U.S. domestic aluminum production capacity and, as the Court of Appeals recognized, "Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators . . . ." (Kaiser's Petition for a Writ of Certiorari, Appendix B at A-15.)

competitors will be aware of and react to the efforts of one another so that the action of a single substantial rival can affect overall market prices." (Brief for Respondent in No. 85-473, at 26.) Like Kaiser and the Solicitor General in this case, the defendants in *Monfort* have responded that the "market shares and other conditions sufficient to threaten oligopoly pricing cannot be equated to the single firm market power that creates a genuine risk of predation" and that "predation is a credible possibility only in market conditions different from, and far more extreme than, those that may enable firms collectively to engage in oligopoly pricing." (Brief for the Petitioners in No. 85-473, at 30-31.) And the Solicitor General has pointed out that the plaintiff in *Monfort*, in asserting its price squeeze claim, "was in essence alleging that it would be the victim not of antitrust violations but of competition." (Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners in No. 85-473, at 16.)

The history of both this case and of *Monfort* shows that in fact there is every reason to anticipate that competitors who have been "squeezed" by the narrowing of their margins will seek their profits in antitrust litigation, asserting theories of price leadership or other forms of oligopoly pricing wherever evidence of genuine market power is lacking. The likelihood that businessmen, to avoid subjecting themselves to such treble damage actions, will alter their behavior in response to the erroneous decisions that have accepted such theories is just as great in "price squeeze" cases as it was in *Matsushita*, and the chilling effect on pro-competitve conduct just as threatening.

The Solicitor General also urges that review of the Court of Appeals' erroneous price squeeze theory is not warranted because as a procedural matter the price squeeze question "appears not to have been dispositive in this case." (Solicitor General's Brief at 17.) The Solicitor General reaches this conclusion because he reads the Third Circuit's opinion to "suggest" that the court "appar-

ently viewed the evidence independent of the price squeeze as providing sufficient grounds for upholding the jury's verdict on the Section 2 claim . . . ." (*Id.*) Although the Solicitor General recognizes that this other evidence probably showed "no more than aggressive competition" (*id.* at 17-18), he suggests that reversal on this ground would be inappropriate because of doubts that the issue was presented by Kaiser's petition.

Regardless of whether it would be appropriate for this Court to reverse and remand with instructions to enter judgment in Kaiser's favor on grounds that neither the price squeeze nor the other evidence was sufficient to support a violation of Section 2,[4] there is simply no basis upon which this Court or the court below could properly uphold the present judgment by reference to the non-price squeeze evidence alone. The Solicitor General's Brief recognizes that in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), this Court found that a new trial was required where one theory of liability argued to a jury was found to be erroneous. (Solicitor General's Brief at 18-19.) It attempts to distinguish *Sunkist* from the present case, however, by asserting that "[h]ere . . . Columbia has presented only a single theory of liability—that Kaiser violated Section 2 by seeking to drive Columbia out of business—supported by a variety of evidence, including the evidence relating to the price squeeze." (*Id.* at 19.) But the holding of *Sunkist* does not turn on whether the plaintiff's case can be characterized as consisting of one or several theories.[5] There, as here, the plaintiffs claimed

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[4] Kaiser submits that this Court could take that course if it chose to examine the non-price squeeze evidence. Kaiser did not urge that result in its petition because it is customary for the court below to consider in the first instance whether the remaining evidence could possibly support the result, so that a new trial should be had, or whether—as should be the result here—judgment for the petition should be directed on remand.

[5] If characterization were required, it would be easy to conclude, as Judge Adams has already done, that Columbia presented a

that they had been the victims of a violation of the antitrust laws and presented a variety of evidence in support of that claim. 370 U.S. at 23-24. And there, as here, the plaintiffs were permitted to have all of their evidence considered together by the jury, rather than being examined in pieces to determine whether each piece of evidence, viewed in isolation, was sufficient to support a verdict for plaintiffs.[6]

This Court held in *Sunkist* that the plaintiffs were not entitled to have a verdict in their favor upheld when that verdict might have been based on evidence that could not properly support a finding of liability. As this Court pointed out, where a plaintiff's case involves the jury's consideration of various claims and conduct, the resulting verdict's "generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, *either in the admission of evidence or in the charge of the court*, the verdict cannot be upheld . . . ." 370 U.S. at 30 (emphasis added) (quoting *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884)).

This reasoning applies precisely to the facts of the present case. The district court rejected Kaiser's proposed instruction that the jury could not properly find a price squeeze on the basis of the expert testimony offered in support of the price leadership question. The possi-

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separate and distinct " 'price squeeze' theory of liability." (Kaiser's Petition for a Writ of Certiorari, Appendix A at A-4.) Indeed, the Solicitor General's Brief itself recognizes that the alleged price squeeze was quite separate from Columbia's other claims. It repeatedly characterizes the price squeeze theory as a separate claim and states that the "independent" evidence submitted to show that Kaiser had attempted to control its competition was "wholly unrelated to the price squeeze claim." (Solicitor General's Brief at 17-18.)

[6] This is the teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), which the Solicitor General cites, and was the basis for the form of verdict in this case. Contrary to the Solicitor General's claim, however, Kaiser never agreed to the form of interrogatories that the trial judge submitted to the jury.

bility that the Court of Appeals might have upheld a verdict had the case not involved price squeeze evidence is irrelevant, for neither the Court of Appeals nor this Court could or can now determine on what evidence the jury's verdict was based.

Nor is there any real basis for concluding that the Court of Appeals would have committed the error the Solicitor General finds "suggested" by its opinion. It is plain that Columbia's price squeeze claim was not, as the Solicitor General's comments might suggest, merely another piece of evidence whose admission the court below might have concluded was harmless error. To the contrary, the Third Circuit devoted its only extensive discussion to the price squeeze allegations, recognizing that it was Columbia's "most serious claim." (Kaiser's Petition for a Writ of Certiorari, Appendix B at A-14.) And notwithstanding the Solicitor General's confusion on the issue, it seems clear that only the alleged price squeeze could possibly be viewed as the cause of Columbia's going out of business—which was the basis of the "going concern" damages it claimed.

In this regard, there can be little doubt that Judges Becker and Adams recognized that the price squeeze claim was crucial to Columbia's judgment or they would hardly have concluded that there should have been rehearing en banc on the issue. Nor is it likely that the remaining members of the court would have failed to follow the authority of *Sunkist* and the Third Circuit's own prior cases.[7]

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[7] *See, e.g., Avins v. White*, 627 F.2d 637, 646 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980), where a jury had rendered a verdict for the plaintiff on a defamation claim that might have been based on any of three allegedly defamatory statements. On appeal, the Third Circuit held that the jury was properly permitted to consider only one set of remarks. Recognizing "the distinct possibility that if we affirm the jury's verdict, we may do so on the basis of non-defamatory statements," the court reversed. *See also Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967-68 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); *Ayoub v. Spencer*, 550 F.2d 164, 168 n.7 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977).

In sum, the procedural matters addressed by the Solicitor General provide no basis for declining to review the erroneous decision below.

III. Columbia's Arguments That It Would Be Inequitable To Reverse And Remand Should Be Rejected.

In its Supplemental Brief addressing the Solicitor General's views, Columbia has attempted to twist the equities underlying the grant or denial of certiorari in its favor by inaccurately characterizing the history of this litigation. Contrary to its assertions, it is not Columbia that has been prejudiced by the repeated trials and appeals in this case, but Kaiser, which has been forced to endure years of litigation to defend against Columbia's frivolous claims. Some nine years after the district judge first granted Kaiser's motion for directed verdict, Columbia has been able to show no more than that Kaiser engaged in what the Solicitor General has termed "procompetitive" behavior. (Solicitor General's Brief at 18 n.16.) In addition to the legal expenses involved in litigating this case for twelve years, Kaiser is now faced with a judgment of more than $9 million, rendered in favor of a failing company which, in its best year, earned only slightly more than $50,000 in profits.

Both the jury verdict and the judgment of the Court of Appeals were fatally flawed. After years of litigation, Kaiser seeks only correction of that error and a remand for determination of the real merits of Columbia's claims.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1984

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Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE CHLORINE INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 36 of the Rules of this Court, The Chlorine Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

The Chlorine Institute, Inc., formed in 1924, is an association of more than 115 firms comprising chlorine

producers and related companies in the United States, Canada and overseas. The association, headquartered at 70 West 40th Street in New York City, includes numerous large chemical companies in its membership, many of whom are vertically integrated firms which produce chemicals to be sold as raw products to other chemical companies. In addition, these same firms compete with their customers in the sale of finished products.

The Third Circuit decision which the petitioners have asked this court to review represents an unwarranted extension of the "price squeeze" doctrine affecting vertically integrated producers. Although The Chlorine Institute, Inc. has no direct interest in the outcome of the case at hand, it believes that the decision below threatens the viability of vertical integration as a legitimate business practice for the reasons set forth below.

ARGUMENT

UNLESS REVIEW IS GRANTED, THE THIRD CIRCUIT'S UNPRECEDENTED "PRICE SQUEEZE" HOLDING WILL HAVE WIDE AND ADVERSE CONSEQUENCES ON TRADE IN MANY INDUSTRIES, IN ADDITION TO THE ALUMINUM INDUSTRY.

The "price squeeze" doctrine, which originated in its orthodox form with Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), is one of the principal antitrust doctrines that is applicable exclusively to vertically-integrated firms in relatively concentrated industries. Vertical integration is a form of industrial

organization that often makes possible significant economies of scope and scale and increases in efficiency in basic industrial sectors, and thus tends to advance the ultimate goal of the antitrust laws, the enhancement of consumer welfare by guaranteeing the highest quality goods at the lowest prices. Judicially-fashioned rules, such as the "price squeeze" doctrine, that threaten vertical integration may also threaten important goals of antitrust policy, unless those doctrines are narrowly tailored to deal precisely with the anticompetitive conduct in question. Since many important industries, including the chemical industry, are comprised of vertically integrated firms that sell finished products in competition with rivals whom they supply with semi-finished goods or raw materials, the question presented in the petition is one that has broad economic consequences for many sectors of the economy.

Vertically-integrated producers of raw materials or semi-finished products often compete either directly with their customers or with their competitors' customers in the sale of finished products. In that competition, non-integrated producers may, for a variety of reasons, be unsuccessful competitors on the basis of price. They may be less efficient. They may require a raw material for which there exists a strong demand for other uses. Until the Third Circuit decision in this case, the courts had recognized no cause of action under the antitrust laws in such circumstances unless the pricing by the vertically-integrated producer was part of an exercise of monopoly power, *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), or was pursuant to a horizontal conspiracy with other suppliers to fix prices.

The court below appears to have ignored these important qualifications of the *Alcoa* "price squeeze" doctrine. It imposed multi-million treble-damage liability on a vertically-integrated producer for a "price squeeze" between the price paid for a semi-finished product by the independent and the prices charged by the vertically-integrated producer for the finished product, even though the independent producer for the finished product did not purchase its raw material from the antitrust defendant. There was evidence neither that the plaintiff's supplier had conspired with the antitrust defendant to fix the independent's raw material price, nor that the antitrust defendant possessed monopoly power over price in the relevant market of the raw material. As such, there was no evidence of a cognizable antitrust nexus between the "squeeze" experienced by the independent and any conduct by the vertically-integrated defendant.

Where a vertically-integrated producer is not shown to possess monopoly power over price in the raw material or semi-finished product, the independent not only has alternative sources of supply from which to purchase its requirements for such products but has the ability to buy its raw material at a normal market-determined price. The existence of such alternate sources of supply normally prevents the integrated producer from successfully "imposing" artificially high, monopoly prices upon the independent. Here the independent has alternative sources of supply—Alcoa and Reynolds—in addition to Kaiser. Liability for a "price squeeze," if recognized at all, should be, and until this decision always had been, limited to the *Alcoa* context, *i.e.* where *no* significant, alternate source of supply exists and the integrated pro-

ducer has *monopoly power* over price in a defined raw material market.

The Third Circuit nonetheless held that a *non-monopolist* integrated producer can be guilty of monopolization under Section 2 of the Sherman Act even though the independent has alternate sources and relies on other sources for its supply of raw material or semi-finished products, if there exists some evidence of "price leadership"—regardless of the nature of such "price leadership" and regardless of the ambiguity of such leadership as to relevant market. The holding is novel and, if it stands, could subject vertically-integrated companies to liability without fault or even knowledge of the material prices or manufacturing costs of non-integrated independents.

The novel and startling aspects of the Third Circuit's holding in this case are compounded by the fact that it is undisputed in this case that petitioners never sold aluminum culvert pipe in competition with their non-integrated rival at prices that were below their costs. Liability was imposed on the basis of purely competitive, non-predatory pricing—pricing that could only *benefit* consumers.

The Third Circuit's ruling is a dangerous extension of the conventional "price squeeze" doctrine and one that seriously threatens vertical integration as a legitimate and beneficial form of industrial organization.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the evidence adduced at trial was sufficient to establish that petitioners engaged in a "price squeeze" violative of Section 2 of the Sherman Act, 15 U.S.C. 2.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents are the successors in interest to the Columbia Metal Culvert Company, Inc. (Columbia), a now-defunct company that fabricated aluminum culvert pipe during the time period relevant in this case.[1] Petitioner Kaiser Aluminum & Chemical Corporation (Kaiser) is a major manufacturer of aluminum, including the aluminum coil that is the raw material used in fabricating aluminum culvert.[2] At the time of the events at issue here, Kaiser sold aluminum coil to independent fabricators such as Columbia through Kaiser Aluminum & Chemical Sales, Inc., a wholly-owned subsidiary. Kaiser also manufactured and sold aluminum culvert pipe to end-users in competition with independent fabricators such as Columbia. Pet. App. A7.

[1] Culvert pipe is used principally in constructing housing developments and highways. It provides an underground channel to carry off water drained from streets and other surfaces. Pet. App. A129.

[2] Aluminum in corrugated sheet form also may be used in producing culvert pipe (C.A. App. 821a-822a); we will refer only to coil because Columbia purchased only aluminum coil during the period relevant to this litigation.

From 1962 until 1971, Columbia purchased aluminum coil exclusively from Kaiser. In 1971, however, Columbia purchased some aluminum coil from Reynolds Aluminum Co., one of Kaiser's competitors. The circumstances surrounding Columbia's decision to purchase coil from Reynolds rather than Kaiser—and Kaiser's reaction to that decision—are subject to dispute,[3] but it is clear that Columbia ceased purchasing aluminum coil from Kaiser in 1971. Pet. App. A7, A36, A120.

Columbia had been one of the largest independent producers of aluminum culvert pipe (C.A. App. 136a), and the record indicates that Kaiser officials at one point told Columbia that if Columbia "had one pound of metal in [its] plant other than Kaiser's," Kaiser would "stop selling [to Columbia] entirely" (C.A. App. 177a). Another Kaiser official, Holmes Collins, warned that if Columbia purchased aluminum from Kaiser's competitors, Kaiser might open a fabrication plant "across the street" from or "next door" to Columbia's fabrication plant (C.A. App. 1286a-1287a). In 1973—after Columbia ceased purchasing aluminum from Kaiser—Kaiser opened a culvert fabrication plant approximately 40 miles away from Columbia's plant and hired Robert Kennedy, a Columbia salesperson, to serve as its independent distributor in Columbia's marketing area (C.A. App. 179a-180a).

In early 1974, the price of the aluminum coil used to manufacture culvert pipe rose sharply. (C.A. App. 277a). As the price of aluminum coil increased, the margin narrowed between Columbia's cost for aluminum coil and the price it received for finished pipe; Columbia found it increasingly difficult to make a profit. In 1975, Columbia for all practical purposes ceased production of culvert pipe. Pet. App. A7.

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[3] Kaiser claims that it "never refused to fill a Columbia order" and that "there is no jury finding that Kaiser refused to deal" (Reply Br. 7 n.5). On the other hand, the court of appeals concluded in both of its decisions in this case that the evidence was sufficient to support a finding that Kaiser's policy was to refuse to deal with Columbia unless Columbia purchased all of its aluminum from Kaiser. See Pet. App. A13, A120 n.1.

2. Columbia filed suit against Kaiser in 1974, alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. 14).[4] Columbia claimed that Kaiser had engaged in a course of conduct designed to maintain its monopoly power in the aluminum culvert pipe market by driving Columbia out of business (Pet. App. A120-A121).

The district court granted Kaiser's motion for a directed verdict at the close of Columbia's presentation of its case to the jury. The court found that the relevant product market could only be defined so as to include both aluminum and steel culvert pipe and that Kaiser's share of that market was too small to support a finding of monopolization under Section 2. The court also concluded that Columbia's evidence was insufficient to support its claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Pet. App. A121-A122.

The court of appeals reversed in part, affirmed in part, and remanded the case for a new trial (Pet. App. A117-A150). It rejected the district court's conclusion regarding the relevant market, holding that the evidence permitted the jury to find that aluminum culvert pipe constituted a separate product market (*id.* at A129-A133). The court of appeals further found that there was sufficient evidence to allow the jury to find "that [Kaiser] intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between [Kaiser] and Columbia, the jury might well have inferred that [Kaiser] knew of the drastic impact its maneuvers would have on Columbia's prospects for survival" (*id.* at A136). The court cited evidence concerning the threats directed against Columbia by Kaiser officials, Kaiser's decisions to locate a new culvert plant near Columbia's plant and assist Kennedy—Columbia's former salesman—in establishing himself as a competitor of Columbia, and Kaiser's ability to price its culvert pipe so as to disadvantage independent fabricators such as Columbia (*id.* at A134-A135). The court therefore remanded the case for a new trial.[5] This Court denied Kaiser's petition for a writ of certiorari (439 U.S. 876 (1978)).

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[4] A claim under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), apparently was abandoned before trial.

[5] The court of appeals also concluded that there was sufficient evidence of a conspiracy between Kaiser and its subsidiary to permit the jury to consider

The case was retried in 1979. Columbia again contended that Kaiser possessed a monopoly over aluminum culvert pipe in the relevant geographic market and that Kaiser's conduct violated Sections 1 and 2 of the Sherman Act. Columbia introduced evidence that Kaiser sought to control Columbia's growth (C.A. App. 168a-169a) and threatened to retaliate against Columbia (C.A. App. 177a) and another independent culvert pipe fabricator (C.A. App. 748a, 759a-761a) for purchasing aluminum from Kaiser's competitors. Columbia contended that Kaiser acted upon this threat and attempted to preserve its monopoly over aluminum culvert pipe by appointing Kennedy as an independent distributor and establishing a culvert plant in Columbia's marketing area (Pet. App. A13).

Columbia also claimed that Kaiser manipulated the prices of aluminum coil and finished pipe so as to subject Columbia to a "price squeeze." Kaiser did not sell aluminum coil to Columbia during the period of the alleged "squeeze"; Columbia's theory was that Kaiser's competitors followed Kaiser's lead in increasing the price of coil and, as a result, Columbia was "squeezed" as effectively as if it had purchased its aluminum directly from Kaiser. Pet. App. A36, A43. Columbia presented expert testimony that Kaiser may have exercised price leadership in the aluminum industry (C.A. App. 570a-650a).[6]

Columbia's Section 1 claim (Pet. App. A136-A144); it affirmed the directed verdict with respect to the Section 1 claim asserted against Kennedy, holding that there was insufficient evidence that Kennedy joined Kaiser in a conspiracy violative of Section 1 (Pet. App. A144-A146). Finally, the court of appeals agreed with the district court that Columbia had not presented sufficient evidence that Kaiser had imposed an exclusive dealing arrangement violating Section 3 of the Clayton Act. The court of appeals concluded that the district court properly entered a directed verdict because of Columbia's "failure * * * adequately to prove that aluminum coil and sheet used in culvert fabrication was a 'line of commerce' within the meaning of the Clayton Act" (Pet. App. A147). It stated that Columbia had not presented sufficient evidence to demonstrate whether aluminum "sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce" (*ibid.*).

[6] Columbia's expert economic witness, Professor Oliver Williamson, testified that the aluminum industry was oligopolistic and that parallel pricing and "price leadership" were common in oligopolistic industries (C.A. App. 597a-601a). Williamson also testified that although Kaiser was not the leading manufacturer of aluminum, the other major manufacturers might well follow

The jury rendered a special verdict, finding that Kaiser had violated both Sections 1 and 2 of the Sherman Act. It awarded damages totaling $5,445,000 after trebling. Pet. App. A35-A36, A67-A71. The district court denied Kaiser's motion for judgment notwithstanding the verdict, but ordered a retrial limited to the issue of damages (Pet. App. A33-A66). The court upheld the jury's finding of an aluminum culvert pipe product market, noting that the record contained the evidence that the court of appeals previously had identified as sufficient to support this market definition (*id.* at A39-A41). The court also found sufficient evidence in the record to support the jury's conclusion that Kaiser's conduct violated Section 2. It noted that the evidence showed that Kaiser implemented its threat to locate a culvert plant in close proximity to Columbia's plant, supported the business started by Columbia's former salesman, and priced its aluminum culvert pipe in a manner that undercut Columbia's prices for the same product. Pet. App. A43-A44.[7]

The district court also upheld the jury's determination that the antitrust violations caused Columbia's damages, but concluded that Columbia had not adduced sufficient evidence to support the damages award itself. The court therefore ordered a new trial limited to the damages issue. Pet. App. A44-A66.

The retrial resulted in a damages award of $9,567,939 after trebling, and Kaiser again moved for judgment notwithstanding the verdict. The district court denied the motion, but held that Columbia was not entitled to recover damages for loss of its "going concern value." The court accordingly reduced the judgment to $4,651,560. Pet. App. A74-A116.

3. The court of appeals upheld the jury's determination regarding liability and reinstated the damages award entered in the limited retrial (Pet. App. A5-A29). At the outset, the court

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Kaiser's pricing decisions with respect to aluminum coil used for culvert pipe because Kaiser was the leading producer of that particular form of aluminum (C.A. App. 600a-601a, 624a-625a). Williamson stated that, in his view, "Columbia was subject to a squeeze and * * * the actions that were initiated by Kaiser were fundamentally responsible" for the squeeze (C.A. App. 622a).

[7] The district court also concluded that the evidence was sufficient to support the jury's determination that Kaiser and its subsidiary engaged in a conspiracy in violation of Section 1 of the Sherman Act (Pet. App. A41-A42).

rejected Columbia's contention that its prior decision foreclosed Kaiser's challenge to the sufficiency of the evidence supporting the monopolization claim, noting that there were "material differences in the evidence presented at the two trials" (*id.* at A12). The court of appeals then considered whether the record contained sufficient evidence that Kaiser's conduct constituted the willful acquisition or maintenance of monopoly power in violation of Section 2.[8] The court concluded that, viewed in the light most favorable to Columbia, the evidence was sufficient to show that Kaiser had "attempted to control its competition" by requiring Columbia and other "independent fabricators * * * to purchase all of their raw materials from Kaiser," and that to the extent Kaiser was unable to control the competition, Kaiser "tried to destroy it" (Pet. App. A13 (footnote omitted)).

With respect to Kaiser's efforts "to control its competition" the court noted that both respondent Bonjorno and another independent aluminum culvert pipe fabricator testified that Kaiser tried to coerce their companies into purchasing aluminum coil exclusively from Kaiser. Moreover, the court of appeals observed, a Kaiser official had stated that if Columbia purchased aluminum from Kaiser's competitors, Kaiser might "open a pipe fabrication plant 'across the street' from Columbia"; the court noted that Kaiser in fact "carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia." Pet. App. A13. The court of appeals also cited "evidence that [a Kaiser official] told Columbia[] * * * that Kaiser would control Columbia's growth and market," and that Kaiser made "veiled threats" to a competing seller of aluminum coil, warning the seller that it could not " 'sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators' " such as Columbia (*id.* at A13 & n.2). The court concluded that "[.]rom this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe" (*id.* at A13).

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[8] Kaiser did not dispute that it had monopoly power in the aluminum culvert pipe market (Pet. App. A7, A12 n.1).

Turning to evidence demonstrating Kaiser's efforts to "destroy" Columbia, the court of appeals first considered Columbia's argument that Kaiser engaged in a "price squeeze" by "deliberately rais[ing] the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe competitively with Kaiser" (Pet. App. A14). The court observed that "[t]he mere existence * * * of a 'price squeeze' is not necessarily an antitrust violation," and that Columbia was required to "present evidence that [Kaiser] deliberately produced the effect" and that the " 'squeeze' was not the result of natural market forces such as supply and demand or legitimate competition" (*ibid.*).

The court found that Columbia had "produced evidence that Kaiser controlled both the price of the raw material"—the aluminum coil—and "the price of the finished [aluminum culvert] pipe" (Pet. App. A14). In light of the fact that Kaiser had an 80% share of the aluminum culvert pipe market, Kaiser's control over the price of pipe was not contested (*id.* at A14-A15).[9]

The court viewed Columbia's evidence with respect to Kaiser's ability to control the price of the raw material as "more problematic" (Pet. App. A15). It first noted that Kaiser "produced over 80% of the aluminum used for making pipe," but that Kaiser contended it was not the dominant manufacturer and therefore did not control the price of the raw material (*ibid.*). The court observed that Columbia's theory was "that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices" (*ibid.*). The court found the opinion of Columbia's expert witness that Kaiser was a "price leader" with respect to aluminum coil "well supported by the evidence" (*id.* at A17). It noted that "[i]f there

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[9] Kaiser did not contest the jury's finding that the aluminum culvert pipe market constituted the relevant product market (Pet. App. A12 n.1). Kaiser produced approximately 80% of the aluminum culvert pipe sold in the stipulated geographic market (*id.* at A7).

were price leadership, it would be most likely that Kaiser set the pricing policies [in coil] because of its extensive expertise and investment * * * in the area" (*id.* at A16). The court concluded that there was sufficient evidence regarding Kaiser's control over coil prices to submit the issue to the jury (*id.* at A17).

The court next considered whether the evidence showed that "Kaiser deliberately manipulated the coil and pipe prices to create a squeeze" (Pet. App. A17). It concluded that "[t]here was evidence that the squeeze was not caused by natural market forces" (*ibid.*), because the evidence supported an inference that Kaiser's price changes were made for "strategic" reasons and showed that the "price of pipe was often below the price of the coil" in 1974 (*id.* at A18). The court held that the record contained "sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition" (*id.* at A18-A19).

The court of appeals also found that "Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor" (Pet. App. A19). The evidence indicated that Kaiser's own credit department had at one point "concluded that Kennedy's operation was an 'unacceptable credit risk,' " and the court reasoned that the "jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business" (*ibid.*). The court concluded that "[g]iven the evidence of Kaiser's anticompetitive behavior * * * there was sufficient evidence to permit the monopolization claim to go to the jury" (*id.* at A20 (footnote omitted)).[10]

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[10] The court of appeals stated that there was no need to consider whether this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), precluded a finding that Kaiser and its wholly-owned subsidiary engaged in a conspiracy violative of Section 1, because "the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy" (Pet. App. A9). The court rejected Kaiser's challenge to the damages award based upon alleged contradictions between Columbia's evidence at the liability trial and its evidence at the damages trial (*id.* at A20-A23), Kaiser's contention that the district court erred by ordering a retrial limited to the damages issue (*id.* at A23-A24), and Kaiser's arguments concerning the conduct of the damages trial and the

DISCUSSION

The court of appeals' analysis of the "price squeeze" issue—the only aspect of the decision below challenged by petitioners—is troubling. The court of appeals correctly recognized that a defendant can implement a price squeeze violative of the antitrust laws only if he controls price in the relevant raw material market. The court erred, however, in concluding that the jury could find that Kaiser exerted the requisite control over aluminum coil prices on the basis of evidence that Kaiser was a "price leader" with respect to the price of aluminum coil.

Despite the error in this aspect of the decision below, we do not believe that review by this Court is warranted. Cases in which an antitrust plaintiff relies upon the existence of a price squeeze to establish liability under Section 2 are relatively rare, and we think it unlikely that any other court of appeals would adopt the view of price leadership evidence set forth in the opinion below. Contrary to petitioners' contention, the court of appeals did not announce a rule of law rejecting the precedent that requires a showing of market power in the raw material market in price squeeze cases. Thus, the case turns on the sufficiency of the evidence to support the jury's verdict. Reversal would require not only a holding that the price leadership evidence cannot support a finding that Kaiser controlled price, but also a determination that none of the conduct independent of the price squeeze on which the court of appeals relied could support the verdict. While the latter question is discussed in the petition (Pet. 26 n.22) and in petitioners' reply brief, it is at least doubtful whether it is "fairly included" in the petition's questions presented for purposes of this Court's Rule 21.1(a). In these circumstances, we are unable to conclude that the price leadership issue presented in this case is of sufficient importance to warrant this Court's review.

1. A "price squeeze" occurs, as an economic matter, when the margin between the cost of raw materials used in a product and the market price of that product is less than the cost of pro-

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evidence relating to the damages award (*id.* at A24-A26). Finally, the court of appeals found that the district court erred by setting aside the portion of the damages award premised on Columbia's going concern value; the court of appeals reinstated the jury's award of damages (*id.* at A26-A29).

ducing and marketing the product. The manufacturer of the finished product is subject to a "squeeze" because the price of the finished product does not permit the recovery of raw material, production, and marketing costs. Price squeezes are frequent occurrences and generally do not reflect either anticompetitive conduct or market failure. For example, a price squeeze often may be the result of a change in the relationship between prices in the raw material market and prices in the finished product market that is attributable to differences in the forces of supply and demand operating in the two markets. See, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 728c1, at 232 (1978).

Questions regarding the significance of a price squeeze under the antitrust laws arise in situations in which a vertically integrated company producing a finished product also sells raw materials to independent manufacturers that produce the same finished product. If the vertically integrated company can control the market price for the raw material, it will have the power to implement a price squeeze. Thus, a "monopolist of copper ingot can squeeze independent pipe fabricators by raising his ingot price while refusing to raise his pipe price, or by lowering his pipe price while maintaining his ingot price" (3 P. Areeda & D. Turner, *supra*, ¶ 728c, at 231). Of course, the fact that such a monopolist has the power to implement a price squeeze does not mean that every price squeeze that occurs in such a market is the result of anticompetitive conduct by the monopolist. For example, as we discuss below (see pages 11-12), a reduction in the pipe price could simply reflect the monopolist's decision to engage in lawful competition in the pipe market.

A well known case regarding the treatment of price squeezes under the antitrust laws is *United States* v. *Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945). The defendant in *Alcoa* possessed monopoly power over aluminum ingot, the raw material used to fabricate a finished product—aluminum sheet—that the defendant sold in competition with independent fabricators. The government claimed that the defendant "consistently sold ingot at so high a price that the 'sheet rollers' [the independent fabricators], who were forced to buy from it, could

not pay the expenses of 'rolling' the 'sheet' and make a living profit out of the price at which [the defendant] itself sold 'sheet' " (148 F.2d at 437).

The court determined that the fact that the defendant reduced its price for ingot after the government commenced an investigation into complaints by independent aluminum sheet manufacturers established a "prima facie case that [the defendant] had been holding ingot at a price higher than a 'fair price,' and had reduced the price only because of pressure" (148 F.2d at 437). The court concluded that it was "unlawful" for the defendant "to set the price of 'sheet' so low and hold the price of ingot so high" (*id.* at 438) because the result of the defendant's conduct was that "there was * * * little or no inducement [for independent fabricators] to continue in the 'sheet' business" (*id.* at 437). The court acknowledged that the price squeeze "was only a consequence" of the defendant's "control over the price of ingot" and therefore "perhaps * * * ought not to be considered as a separate wrong" (*id.* at 438).[11] Nevertheless, the court concluded that the squeeze did constitute an unlawful exercise of the defendant's monopoly power in the raw material market (*ibid.*).

The implicit assumption underlying this aspect of *Alcoa*—that a monopolist has a duty to set its prices in a manner that avoids injuring competitors—is fundamentally inconsistent with the principle that the antitrust laws "were enacted for the protection of *competition,* not *competitors*" (*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original)). Courts and commentators accordingly have rejected the view that the antitrust laws limit a monopolist's ability to utilize otherwise lawful methods of competition, such as above-cost price cuts. See *California Computer Products* v. *International Business Machines Corp.,* 613 F.2d 727, 744 (9th Cir. 1979); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 281 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1981) ("a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits"); M. Handler, *Reforming The Antitrust Laws* 92 (1982) (footnote omitted) ("[A] monopolist is not to be shackled in his competition[.] * * * This is the doctrine

[11] Indeed, the court specifically stated that the squeeze formed no part of "the reasoning by which [it] conclude[d] that the monopoly was unlawful" (148 F.2d at 438).

which the various courts of appeals in the 1970's have enunciated, discarding the contrary implications of *Alcoa*"); 3 P. Areeda & D. Turner, *supra*, ¶ 729c, at 235-238.[12]

The *Alcoa* price squeeze discussion in inconsistent with this basic principle of modern-day antitrust analysis because the court failed to consider the fact that a price squeeze generally is not the result of anticompetitive conduct. As we have discussed, price squeezes typically are caused by differences in supply and demand in the raw material and finished product markets. A squeeze also might occur because the vertically integrated firm is more efficient in producing the finished product and therefore incurs production and marketing costs that are lower than the costs of its independent competitors. Of course, "[a]ny 'squeeze' resulting from these causes is desirable, involving a shift in bu[s]iness from less to more efficient operations." R. Bork, *The Antitrust Paradox* 243 (1978); see also H. Hovenkamp, *Economics and Federal Antitrust Law* § 5.6, at 149-150 (1985); R. Posner & F. Easterbook, *Antitrust Cases, Economic Notes, and Other Materials* 874-875 (2d ed. 1981); 3 P. Areeda & D. Turner, *supra*, ¶¶ 728cl-728c3, 729c, at 232-233, 235-238.

2. A plaintiff attempting to prove that a defendant implemented an unlawful price squeeze plainly must demonstrate that the defendant possessed monopoly power in the relevant raw material market. A defendant that lacked power over the price of the raw material would have no control over one end

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[12] The *Alcoa* court's reasoning that a monopolist must charge a "fair" price also has been rejected. See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d at 294 ("unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive"); 3 P. Areeda & D. Turner, *supra*, ¶ 729c, at 237 (*Alcoa*'s price squeeze holding runs counter to the principle that "a lawful monopolist is entitled to charge a monopoly price"); L. Sullivan, *Handbook of the Law of Antitrust* § 47, at 118 (1977) ("[t]he reasonable price standard is intrinsically vague and difficult"). Indeed, the monopolist's decision to maintain prices at high levels may have the desirable effect of encouraging entry into the monopolized market. *Berkey Photo, Inc.*, 603 F.2d at 294.

of the "squeeze" and, therefore, could not be held responsible for any diminution in the margin between the raw material cost and the market price for the finished product. See *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176 n.4 (8th Cir. 1982) (price squeeze occurs when a "vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market"); *Berkey Photo, Inc.*, v. *Eastman Kodak Co.*, 603 F.2d at 276 ("whatever problems of murkiness may plague the *Alcoa* opinion, on this point it it pellucid. The defendant had employed its monopoly power in the ingot market to impose a price squeeze").[13]

Indeed, when the defendant lacks power over price in the raw material market, its market power in the finished product or "downstream" market is irrelevant. If the defendant used its downstream market power to raise prices, any pressure on competitors would be lessened or eliminated. Of course, if the defendant chose to reduce its prices in the downstream market, competitors' profits might suffer. But a monopolist's competitive, above-cost pricing is not an abuse of monopoly power, even if such pricing disadvantages less efficient rivals. See, *e.g.*, *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 86-87 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 926 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975). Thus, proof that the defendant possessed power over price in the raw material or "upstream" market is an indispensable element in establishing that the defendant engaged in a price squeeze unlawful under Section 2.

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[13] Price squeeze issues frequently have arisen in cases where a regulated entity, generally an electrical utility, seeks relief from "excessive" wholesale rates in order to compete on an equal footing at a retail level. This Court held in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), that federal regulators may remedy such squeezes by " 'put[ting] wholesale rates in the lower range of the zone of reasonableness' " (426 U.S. at 279 (citation omitted)). *Conway* concerned the authority of the Federal Power Commission to order relief under the Federal Power Act, not Section 2 of the Sherman Act.

a. Kaiser contends (Pet. 17-18) that this case warrants review because the court of appeals imposed liability for the price squeeze without finding that Kaiser possessed monopoly power in a defined raw material market. Although the court of appeals' discussion of this issue is not completely clear, we do not believe that the court of appeals dispensed with that requirement.

Monopoly power, of course, is "the power to control prices or exclude competition." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (footnote omitted); see also *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). The district court in this case instructed the jury that, in order to establish that the price squeeze violated Section 2, "[Columbia] would have to show by the evidence that the Kaiser defendants were *dominant* or had *sufficient power in the raw material market to control the price of the coil or to exclude competitors*" (C.A. App. 3949a (emphasis added)). Thus, the jury was required to find that Kaiser exercised power over price in the relevant market before holding Kaiser liable for the price squeeze.

The court of appeals expressly stated that "[t]he mere existence * * * of a 'price squeeze' is not necessarily an antitrust violation. The plaintiff must present evidence that the defendants deliberately produced the effect * * * [so that] the jury [may] conclude that the 'squeeze' was not the result of natural market forces such as supply and demand or legitimate competition" (Pet. App. A14). And the court concluded that the evidence introduced by Columbia showed that "Kaiser controlled * * * the price of the raw material." *Ibid.*; see also *id.* at A15. Thus, the court recognized that Columbia had the burden of demonstrating that Kaiser exercised the requisite degree of control over raw material prices.

b. The court of appeals stated that evidence that Kaiser was the "price leader" in the market for aluminum coil was sufficient to establish Kaiser's power over the price of aluminum coil (see Pet. App. A15-A17). In our view, the court of appeals erred by concluding that the jury reasonably could have relied upon this evidence to find that Kaiser controlled prices in the raw material market.

Price leadership is a common phenomenon, particularly in basic industries, such as aluminum and steel, that rest upon an undifferentiated commodity and may be characterized as oligopolistic. See, *e.g.*, A. Thompson, *Economics Of The Firm* 394-398 (4th ed. 1985); K. Cohen & R. Cyert, *Theory of the Firm: Resource Allocation In A Market Economy* 241-249 (1965). Competitors in such industries sometimes follow the price increases of a "leader," with the result that pricing changes within the industry are fairly uniform. See 4 P. Areeda, *Antitrust Law* ¶¶ 1410b, 1432 (1986). It is possible that a firm exercising price leadership in a raw material market might be able to impose a price squeeze upon a competitor in a related finished product market, even where the price leader did not sell the raw material to the downstream competitor. However, such a strategy is not likely to be successful and, therefore, is not likely to be pursued in practice.

A monopolist engaging in a price squeeze generally must bear the cost of lost sales in the raw material market resulting from the high above-market raw material prices that are necessary to implement the squeeze. In the price leadership context, a price squeeze strategy could succeed only if the price leader's competitors in the raw material market also were willing to forgo sales by adhering to the price leader's prices. It is more likely that such firms would choose to sell the raw material to the target of the squeeze and others at a lower price, as Kaiser's competitors in fact did in this case (see C.A. App. 155a-156a, 185a, 241a). Thus, where firms selling to the target of the price squeeze are in a position to profit by charging a lower price and expanding sales, evidence of price leadership is insufficient to show that the defendant controlled the price at which the raw material was sold by other firms in that market. See *Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 530-531 (5th Cir. 1982) (rejecting contention that evidence establishing that an industry is "an oligopoly, with [the defendant] as its price leader" suffices to establish Section 2 liability); cf. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986), slip op. 12.

This conclusion is supported by the settled rule that parallel price movements by competitors are not by themselves evidence sufficient to establish a price-fixing agreement in violation of Section 1 of the Sherman Act. *Theatre Enterprises, Inc.* v. *Para-*

mount Film Distributing Co., 346 U.S. 537, 541 (1954); 4 P. Areeda, *supra*, ¶ 1432. If price leadership and parallel price movements are not sufficient to show an agreement under Section 1, the same evidence should not be sufficient to demonstrate that Kaiser had the ability to force its competitors to follow its prices. Price leadership evidence does not tend to exclude the substantial possibility that horizontal competitors have made purely independent pricing decisions. Cf. *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (evidence that tends to exclude the possibility of independent action by the manufacturer and distributor must be adduced in resale price maintenance cases). We submit that where, as here, firms selling to the target are in a position to profit from the situation by charging a lower price and expanding sales, imposing liability on a firm that did not sell raw material to the target of the squeeze would be appropriate only if sellers of the raw material had entered into an agreement with respect to price.

The court of appeals did not find any evidence of a horizontal price-fixing agreement in this case. It simply emphasized that Kaiser, as the largest producer of aluminum coil for use in culvert pipe, had "the largest interest in pipe prices" (Pet. App. A16), and that competing sellers customarily followed Kaiser's prices (*ibid.*).[14] The court of appeals erred by concluding that this price leadership evidence demonstrated the control over raw material price needed to establish a price squeeze.[15]

3. Despite the court of appeals' misplaced reliance on the price leadership evidence, we are unable to conclude that review by the Court is warranted in this case. Questions regarding price squeezes do not arise with any frequency under the antitrust laws because a defendant rarely possesses sufficient market power in both the raw material and finished product markets to

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[14] Kaiser claims that competitors did not follow its prices (Pet. 25-26).

[15] Respondents contend (Br. in Opp. 12) that "the record establishes that [Kaiser] did in fact have dominant and monopolistic power in coil," an apparent reference to evidence that Kaiser "produced over 80% of the aluminum used for making pipe" (Pet. App. A15). Kaiser argues (Pet. 24-25) that the product market should not be limited to aluminum coil used in culvert fabrication, and that its share of the proper market is significantly lower. The court of appeals did not address the significance of this evidence in discussing whether Kaiser exercised power over the price of aluminum coil.

support a credible claim that it controlled prices in both markets. For that reason alone, the questions presented do not appear to be of sufficient importance to warrant review by this Court. In addition, we are aware of no other price squeeze case in which a court has relied upon price leadership evidence to find that the defendant controlled prices in the relevant market. We doubt that other courts of appeals will adopt the reasoning of the court below because of the obvious shortcomings of price leadership evidence as proof of power over price.

Moreover, review by this Court is not necessary because the question whether price leadership evidence is sufficient to demonstrate control over price appears not to have been dispositive in this case. The court of appeals' opinion suggests that the court apparently viewed evidence independent of the price squeeze as providing sufficient grounds for upholding the jury's verdict on the Section 2 claim; the court expressly concluded that this evidence showed that Kaiser "attempted to control its competition, and failing that, tried to destroy it" (Pet. App. A13). Thus, the court found that Kaiser had (1) told "Columbia's owners that Kaiser would control Columbia's growth and market"; (2) "attempted to coerce" Columbia and another independent fabricator "into purchasing only from Kaiser"; (3) threatened to "open a pipe fabrication plant 'across the street' from Columbia"; and (4) "carried through with [this] threat" when it opened a plant forty miles from Columbia's factory (*ibid.*). The court of appeals concluded that this evidence—which is wholly unrelated to the price squeeze claim—permitted "a jury [to] legitimately infer that Kaiser attempted to control its competition." *Ibid.*; see also *id.* at A105 (district court decision).

Whether the evidence was legally sufficient to support such a finding by the jury is not, in our view, an issue fairly comprised in the questions presented in the petition for certiorari (although, as we have explained, that issue is discussed in the petition and reply brief). Were the Court to conclude that the question is presented, however, we would have grave doubts

that the evidence suffices to sustain a verdict under Section 2 because Kaiser's conduct may well be characterized as no more than aggressive competition.[16]

Nor do we believe that Kaiser has shown any persuasive ground for believing that a decision by this Court on the price squeeze issue would affect the outcome of the case. Kaiser asserts (Reply Br. 8-10) that because the price squeeze issue figured prominently at trial and in the court of appeals' decision, the decision below must be reversed if the evidence relating to the price squeeze claim is found to be insufficient as a matter of law. But antitrust plaintiffs are not required to "compartmentalize" their proof (*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). And each and every allegation of anticompetitive conduct need not be proven in order to establish Sherman Act liability. Cf. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, No. 84-510 (June 19, 1985), slip op. 13. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), upon which Kaiser relies (Reply Br. 9-10), the Court found that a new trial was required

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[16] In our view, Kaiser's conduct is most reasonably understood in light of its interest in increasing its sales of aluminum, which led it to develop and promote new uses for aluminum. Thus, Kaiser invested substantial resources in developing a market for aluminum culvert pipe as a substitute for steel and concrete (C.A. App. 57a-59a, 73a-74a). Selling aluminum culvert pipe directly to users and selling coil to independent fabricators of culvert pipe both serve the lawful goal of maximizing sales of aluminum. Kaiser apparently concluded that selling through Columbia was an efficient means of serving a particular area of the country, as long as Columbia was willing to purchase all of its coil from Kaiser. When Columbia instead turned to Kaiser's competitors for coil, however, Kaiser had to locate a fabricating plant in Columbia's area or risk losing sales, because the cost of transporting finished pipe from a distant plant is substantial (C.A. App. 794a). Viewed from that perspective, Kaiser's decision to locate a fabrication plant in Columbia's marketing area was a rational and, on its face, procompetitive response to its loss of Columbia as a coil customer. Further, we see nothing anticompetitive in Kaiser's decision to appoint Kennedy as an independent distributor. It is undisputed that Kennedy was dissatisfied with his compensation from Columbia, and that he was told that he was free to seek employment elsewhere. Kaiser's decision to appoint Kennedy as a distributor thus served both Kennedy's and Kaiser's interests. Finally, the statements of the Kaiser official cited by the court of appeals can plausibly be viewed merely as the sort of posturing one might expect from an aggressive salesman.

because "one theory of liability" was found to be erroneous (370 U.S. at 29). Here, by contrast, Columbia has presented only a single theory of liability—that Kaiser violated Section 2 by seeking to drive Columbia out of business—supported by a variety of evidence, including the evidence relating to the price squeeze. A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render the other evidence insufficient to support the jury's verdict.

Kaiser also argues (Reply Br. 9-10) that a new trial regarding damages would be necessary if this Court found that the record did not contain sufficient evidence to support the price squeeze claim. However, the court of appeals concluded (Pet. App. A23-A24) that on the facts of this case

> it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. [Respondents'] basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business.

The court therefore concluded that the district court did not err by ordering a second trial limited to the issue of damages because "[w]hen the antitrust injury is of an indivisible nature, * * * the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both" (*id.* at A24). This reasoning suggests that a new damages trial would not be required if the price squeeze claim were eliminated as a basis for the jury's finding of liability. See also Pet. App. A81 (district court decision).

Finally, we note that the 1979 trial was bifurcated; the jury rendered its special verdict regarding liability, heard the evidence regarding damages, and then rendered its special verdict regarding damages (Pet. App. A35, A67-A71). The interrogatories submitted to the jury, which were the result of an agreement between Kaiser and Columbia, did not request the jury to specify the facts that formed the basis of its determination regarding the Section 2 claim (Pet. App. A67-A69, A80-A81, A105). The uncertainty regarding the liability jury's

determination thus stems from the generalized nature of the special verdict form agreed to by Kaiser. In these circumstances, we do not agree that a third trial necessarily would be required if this Court were to reject the court of appeals' price squeeze analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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